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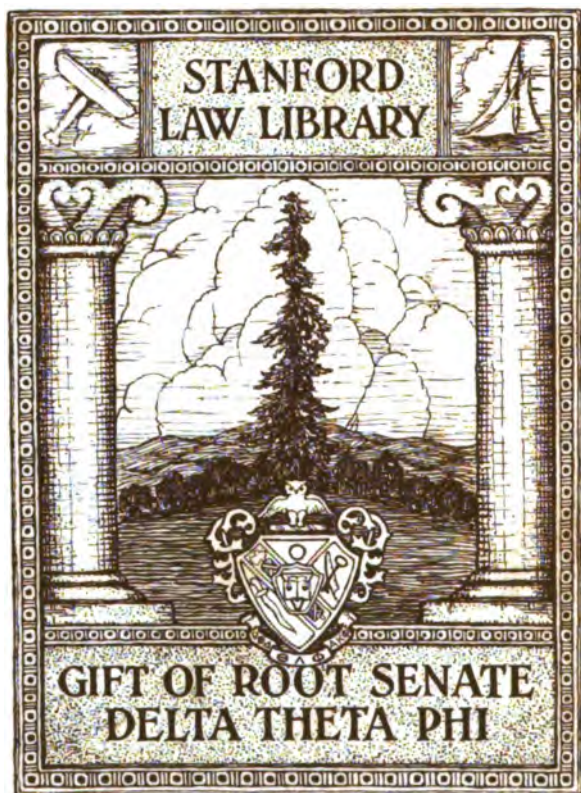
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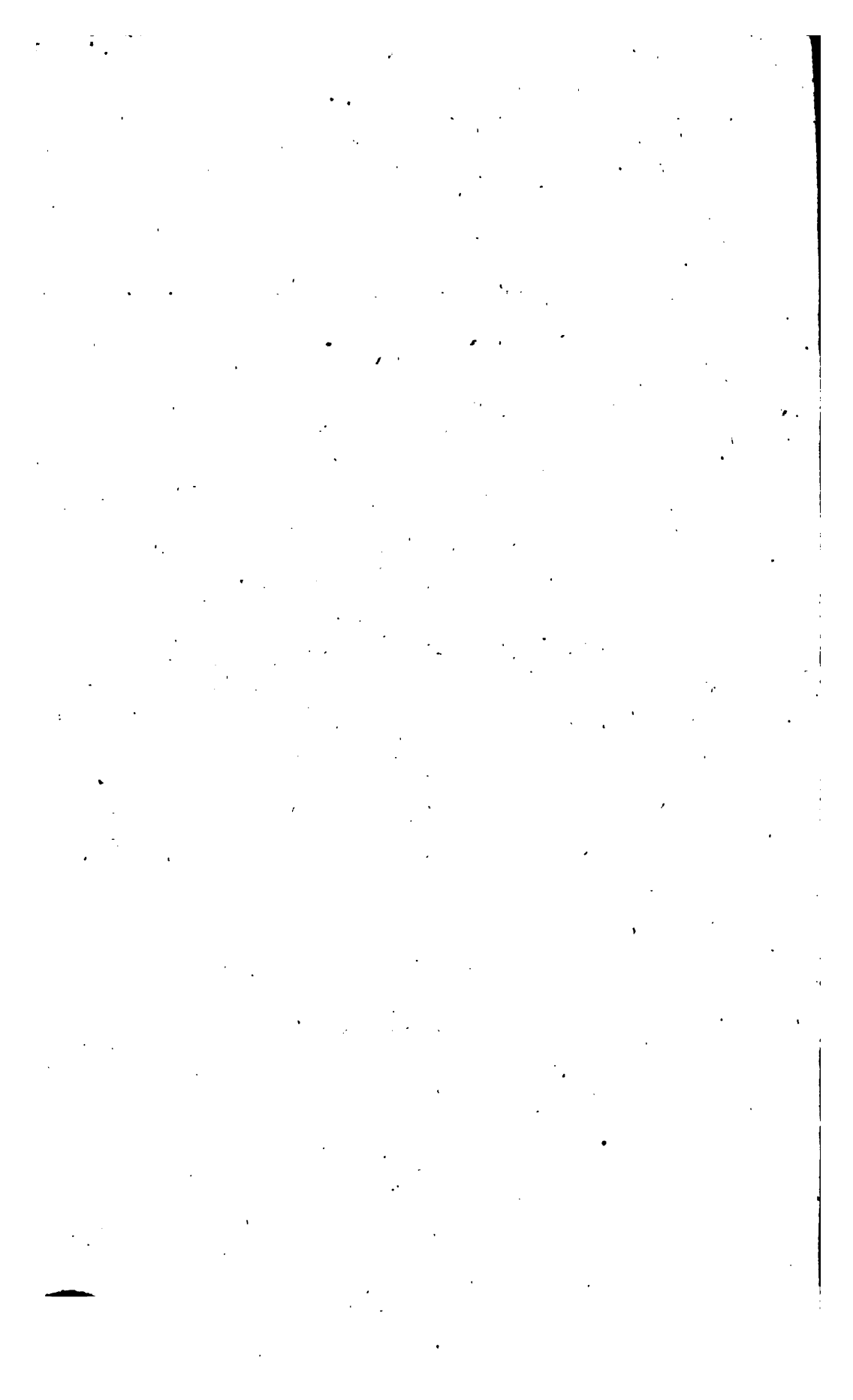
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A

TREATISE

ON THE LAW OF

INSURANCE,

IN FOUR BOOKS;

- I. OF MARINE INSURANCES,
- II. OF BOTTOMRY AND RESPONDENTIA,
- III. OF INSURANCE UPON LIVES,
- IV. OF INSURANCE AGAINST FIRE.

By SAMUEL MARSHALL,
SERJEANT AT LAW.

IN TWO VOLUMES.

VOL. II.

Laudo mercatorem, qui fidem, etiam contra leges datam, servat; sed, et laudo judicem, qui fraudes et nequitias mercatorum non sovet, et rescindit pactiones, quas lex rescindi jubet. Judicis est leges sequi; nec disputare an turpiter faciat affecurator, qui fidem datam violat.—Ego, turpiter faciat, sed, et turpiter facit qui contra leges paciscitur.

Byak. Quæst. jur. priv. lib. 4. c. 5.

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A
T R E A T I S E
ON THE
L A W O F I N S U R A N C E.

BOOK THE FIRST.

C H A P. XI.

Of the Ship.

IN every marine insurance the ship must always be an object of great interest to both parties. From the nature of the contract, there are certain stipulations or conditions implied in it, relative to the ship, which the insured is bound to fulfil. These are, that the ship shall be seaworthy; that she shall not be changed, unless from necessity, without the consent of the insurers; and that she shall be conducted and navigated according to law. These matters which embrace all that it will be necessary to say on the subject of the ship, will be considered under the following heads:

1. Of the seaworthiness of the ship;
2. Of changing the ship;
3. Of insurances on goods in "*ship or ships*;"
4. Of the conduct of the ship.

Sect. 1.

Of the Seaworthiness of the Ship.

IT is clear, from the authority of all the writers on the subject of marine insurances, as well as upon principles of natural justice, that no loss occasioned by the internal defect of the thing insured, shall fall on the insurer; and therefore, if the ship be found incapable of performing the voyage insured, and her inability do not proceed from any accident or misfortune, or from the violence of the winds

No loss arising from the internal defect of the thing insured can fall upon the insurer.

or waves, but from latent defects, existing before the voyage commenced, the insurer is discharged (a).

There is an implied warranty in every policy, on ship or goods, that the ship shall be seaworthy.

There is, moreover, in every insurance, whether on ship or goods, an implied warranty that the ship shall be seaworthy when the risk commences; that is, that she shall be *tight, staunch and strong, properly manned, provided with all necessary stores*; and in all respects fit for the intended voyage.—The consideration of the insurance is paid, in order that the insured may be indemnified against certain contingencies; and it supposes that the insurer may gain the premium: But if the ship be incapable of performing the voyage, there is no possibility of the insurers gaining the premium, and in that case, the contract, on his part, would be without consideration, and consequently void.—The insurer undertakes to indemnify the insured against the *extraordinary and unforeseen perils of the sea*, and it would be absurd to suppose that any man would insure against those perils, but in the confidence that the ship is in a condition to encounter the *ordinary perils* to which every ship must be exposed in the usual course of the voyage proposed.

In France, every ship is surveyed before the voyage commences.

By the law of France it is directed, that every merchant ship, before her departure from the place of her out-fit, shall be surveyed by certain officers appointed for that purpose, and reported to be seaworthy, (*en bon état de navigation*); and that, previous to her return, before she takes her homeward cargo on board, she shall be again surveyed.—*Valin* (b) shews how little confidence he placed in these surveys, which, he says, are only made upon the external parts, for the ship is not unsheathed, and therefore the inward and hidden defects are not discovered.—Indeed it seems to be much better to leave the validity of the policy to depend on the seaworthiness of the ship, to be ascertained after a loss has happened, by an investigation of the true cause, than to permit so important a question to be decided by the report of mercenary officers. A ship may, to all appearance, be perfectly capable of performing a voyage, and it is only after a loss has happened that her latent defects

But the report upon such survey was not sufficient proof of seaworthiness.

(a) *Le Guidon*, c. 5, art. 8, *Valin*, tom. 1, p. 654, tom. 2, p. 80. *Pothier*, h. t. n. 66, *Emerig.* tom. 1, p. 580, *Ord. de la mar.* h. t. art. 12. 2 *Mag.* 90, 140.—(b) *Tit. fret. sur.* art. 12.

are discovered, and her true state at the time of her departure comes to be known. Nor was the survey thus made by the *French* conclusive to prove that the ship at her departure was sea-worthy. It raised a *presumption* that she was so; but it still remained open to the insurers to shew the contrary.

As the insurer is only liable for losses arising from the *extraordinary and unforeseen perils of the voyage*, if the ship become innavigable, or incapable of proceeding on the voyage insured, all the writers agree that the *presumption* shall be that this proceeded from the age and rottenness, or other defect of the ship, unless it be made *appear* to have been occasioned by sea damage or some unforeseen accident (a). The reason assigned for this is, that, by the marine law, an *indefinite* innavigability is never classed among the perils to which the insurer is liable; because a thing so subject to be injured by time and the use which is made of it, cannot be supposed always to retain its original state; and that, though a ship may, at the time of her departure, appear capable of performing the voyage insured; yet, if the voyage should prove longer than usual, her internal defects will sometimes become apparent, from time, from the pressure of the cargo, and from the action of the seas, without any extraordinary accident.

Casaregis (b), in support of this doctrine, cites the following decision of the *Rota of Florence*.—A ship, with a cargo of goods on board, sailed from *Cadiz* for *Amsterdam*; and when she was off *Cape St. Vincent*, she was forced by a strong north wind to put into *St. Croix de Teneriff*, to avoid foundering. Being there surveyed, she was, by the consul, pronounced to be *innavigable*.—The insured insisted that the above circumstances amounted to sufficient evidence of the loss, which could only be attributed to the contrary winds, which, having caused

A ship shall be presumed not to have been sea-worthy, unless it be made appear that her disability arose from sea-damage or other misfortune.

A ship springs a leak at sea, and is forced by contrary winds to run for the nearest port, where she is pronounced innavigable:—Whether this shall be presumed to have arisen from her not having been sea-worthy when she sailed.

(a) *Targa*, ch. 60, p. 256. *Pothier*, h. t. n. 65. *Casaregis* dif. 142, n. 15. *Valin*, sur art. 28, 29, & 46, h. t. p. 76. In p. 98, he says, "La présomption est, que le mauvais état du navire vient de son propre vice."—(b) *Loc. cit.*

the ship to spring a leak, had rendered her innavigable.—The insurers replied that the insured were bound to give *conclusive* evidence of the loss; that the witnesses examined by the consul did not depose that the loss was occasioned by the contrary winds; that the leak did not shew a right to abandon, because in the course of a voyage it sometimes happens to the best ships to spring a leak, without any extraordinary sea-damage.—The judges of the *Rota* adopted these reasons, and decided in favour of the insurers. Their judgment was delivered to the effect following:—The question being, whether the ship had been declared innavigable on account of the violence of the contrary winds, or on account of some peculiar and inherent vice, *it has appeared to us*, that this being the case of innavigability, it ought rather to be attributed to the inherent vice of the ship. The bad condition of the ship is *presumed* to proceed from an ancient, certain, inherent, natural, and constantly-operating cause, rather than from the effect of the winds, which is accidental and extrinsic (*a*). Decay and rottenness are reputed the most active and most powerful causes from which innavigability can proceed (*b*). A storm is not deemed a sufficient cause of a loss, if this can be shewn to have proceeded from the inherent vice of the thing insured. The mere *possibility* that the injury has not been occasioned by the sea, is enough to shew that the proof of the insured is insufficient (*c*).

Emerigon, however, holds that, in consideration of the previous survey, the presumption that the ship was seaworthy when she sailed shall prevail till the insurers shew the contrary; and he cites a number of decisions of the

(*a*) Totum damnum referri debet causæ antiquiori, originali, certæ, et intrinsicæ fragilitatis et vetustatis navis, n. 22.—(*b*) Vitium intrinsicum infectionis et corruptionis reputandum sit pro causâ potentiori, et majoris activitatis, ex prædictis, cui propterea principaliter effectus est attribuendus, n. 24.—(*c*) Sola possibilitas in contrarium sufficit, ut probatio non dicatur sufficiens. n. 36, &c.

admiralty court of *Marfeilles* upon this point, from which it would seem that no evidence of the rottenness, or of the decayed state in which the ship may be found *after she sails*, is sufficient to countervail the report of the previous survey (a).

And it must be owned that, in practice, though the rule, as laid down by the writers above cited, ought never to be lost sight of, many difficulties may arise from too strict an observance of it. Where a ship is lost, or is condemned in the course of the voyage, as being incapable of proceeding to her place of destination, and this cannot be ascribed to stress of weather or any accident in the voyage, the fair and natural presumption is, that she was not sea-worthy; and then it is incumbent on the insured to shew that, at the time of her departure, she was in fact sea-worthy. This presumption is founded upon principles of public policy, which require that the ship, at the time of her departure, shall be in such a state as to be capable of encountering the ordinary perils of the voyage insured; and this must be the true meaning of the words, "*tight, staunch, and strong*," used in charter-parties. However perfect a ship may be in herself, yet, if she be incapable from the nature of her construction, or any other cause, of performing the voyage insured, with the proposed cargo on board, she is not sea-worthy. She must be, in all respects, fit for the trade in which she is meant to be employed. And it is a wholesome rule that the insured shall be held to pretty strict and cogent proof of this. It is also a wholesome rule, that this proof shall not only be cogent and strong to shew the ship's sufficiency at the time she sailed, but also that the insured shall bring forward *all* the evidence which he has upon the subject; particularly

(a) *Valin* sur art. 29 h. t. seems to have these decisions in his mind when discussing this point, he says,—“ On cite sur ce sujet plusieurs arrêts d'*Aix* et des sentences de *Marseille* contre les assureurs; mais ces préjugés, pour être juridiques, doivent avoir été rendus sur des preuves que les navires avoient été rendus innavigables par fortune de mer. Cependant qu'est ce que ces preuves pour l'ordinaire? Des procès-verbaux frauduleux de la part des capitaines, toujours disposés à favoriser les armateurs, sans égard à la vérité et la justice.”

what

If the loss or disability of the ship may be fairly ascribed to sea-damage, the proof of un-sea-worthiness lies on the insurers.

Neither the ignorance or innocence of the insured will avail him against a breach of this implied warranty.

The purchaser of a ship lends her to be docked and completely repaired, and the ship-builder is ready to swear that this was done; yet if it afterwards appear that she was not sea-worthy, though this proceeded from a latent cause, the policy is void.

Lee v. Beach,¹
at N. P. after M.
1762.

what relates to the state she was in when the loss happened, or when she was condemned as unfit to proceed on the voyage. If any thing should be withheld which the insured might have produced, it will always throw great suspicion on his case. Too much often rests on the single testimony of the master, always inclined to favour his employers (a).—If, on the other hand, it appear from the facts of the case, that the loss may be fairly attributed to sea-damage or any other unforeseen misfortune, but yet the insurers mean to alledge that the ship at her departure was not sea-worthy, the *onus probandi* will lie on them. This seems to be the simplest rule; and the simplest rules are always the best, particularly in matters of commerce.

If it be clearly ascertained that the ship, at the time of her departure, was not in a condition to perform the voyage insured, neither the innocence or ignorance of the insured, nor any precautions he may have taken to make her sea-worthy, will avail him against the breach of his implied warranty.

Thus: The plaintiff had purchased a ship, and after having her surveyed by proper persons, sent her into dock, and there had her fully repaired; and the ship-builder was ready to swear that he had effectually repaired her, as he thought, having done all that was requisite to make her a good ship. Being then taken into government service, she was, as usual, surveyed by the persons employed for that purpose, and reported to be a good ship, she sailed out of the *Thames*, and arrived at *Portsmouth*; but being very leaky with bad weather, the admiral ordered her to go into port, and undergo a survey there. This was done, and it was found, on opening her, that some timbers near her keel were very bad; inasmuch that she was condemned as insufficient to proceed. The plaintiff having insured her, brought an action on the policy to recover the loss; and at the trial insisted that he had a right to prove, and could prove, that he had done every thing in his power to send her out a good and sufficient ship; but that her disability

(a) Vid. sup. 367, n.

was the effect of a *latent cause*, not known to him or discovered when she was surveyed, or in the dock repairing.—Lord *Mansfield*, who tried the cause, said that it appeared that the ship had *died a natural death*, and had received her death's blow before the risk commenced; and, however innocent the plaintiff might be, and however cautiously he had acted, the underwriter was equally innocent; and the implied warranty must and ought to have its effect; and he nonsuited the plaintiff.

So, where an insurance was made on goods on board the *Amy and Letitia*, at and from *Montserrat* to *London*, the ship sailed the 16th of *July*, and the next day, without any bad weather, she was found to be very leaky, and obliged to run for the island of *St. Thomas* where she was unloaded, and the goods, being much damaged, were sold. In an action on the policy to recover for this loss, it was agreed, on the one hand, that the ship was not sea-worthy to undertake the voyage insured; and on the other, that the insured was totally ignorant of this, when the goods were shipped.—The plaintiff was nonsuited.—Lord *Mansfield* said, that the implied warranty could not be dispensed with in any case: However, as it was a question of law, he would save the point; but the plaintiff's counsel declined this, being satisfied that it was against them.

Though the owners may not know the true state and condition of the ship in a distant part of the world, yet, if they insure, the law will presume that the master, or some other agent, will take care that the ship be sea-worthy before she sails. Hence it is, that though a ship has been long absent in the remotest parts of the world, if an insurance be made on her homeward passage, the warranty that she was sea-worthy at the time of her departure, is as strongly implied in the contract, as if she had sailed from an *English* port. And though no fraud be imputable to the insured; though they supposed, or believed, that the ship was in all respects sea-worthy; though no blame be imputable to the master, or any other agent of the insured; and though the underwriters were as well acquainted with the state and condition of the ship as the owners; yet, if in fact she was not sea-

And the insured being unacquainted with the state of the ship, does not alter the case.

Olivier v. Cowley, at N. P. after Tr. 1765.

If the ship be not sea-worthy, the policy will be void, though both the insured and the captain believed her to be sea-worthy; and though the insurers knew the state she was in as well as the owners.

worthy at the time of her sailing, the contract will be void. These principles will be found fully established in the following case.

Mills and another v. Roebuck, Park, 221.

An insurance was made on a ship called the *Mills Frigate*, lost or not lost, "from the *Leeward Islands* to *London*, "beginning the adventure from her arrival at the *Leeward Islands*."—In an action on this policy, the declaration stated the loss to have arisen, from divers leaks sprung by the ship, from the starting of planks, and occasioned by tempestuous weather and the mere perils of the sea. Upon the trial of the cause, it appeared,—“That the ship was *French* built, and the defendant knew her to be such: That the bolts of such ships being iron, grow rusty and break; and then the timbers suddenly become loose, and the ship is thereby rendered incapable of bearing the sea, without any *visible* marks of decay: That she had been generally employed by the plaintiffs in the *West India* trade, and large sums constantly insured on her: That before she sailed on her last voyage, she was put into complete repair; but her iron bolts could not then be examined without taking off her sheathing, which had not long before been put on: That the first underwriter on the policy, with others, kept a register of all ships insured by them, containing a particular description of each, and employed a surveyor to examine them: That the *Mills Frigate* had long been entered in this register, and, before her last voyage, was examined by the surveyor, and found fit to undertake the voyage *to and from the Leeward Islands*: That the first underwriter knew as much of the condition of the ship as the plaintiffs, and underwrote 400 L. on her outward voyage: That at *St. Kitts* she had such a repair as was deemed sufficient for her homeward voyage, but her bolts could not be examined there: That at *Nevis*, where a loading was expected, the planters, knowing she had been leaky on her outward voyage, refused to put sugars on board her; but to satisfy them, a survey was made by six captains, who reported that she was strong and sound, and, when caulked, would be fully sufficient to carry a cargo to *London*: That she was accordingly caulked, and during

two months, while she was loading, continued tight: That the day after she sailed from *Nevis*, without any bad weather, she sprung a leak, which obliged the captain to bear away for *St. Kitts*, where she arrived in two days, and it was there found that she had started a plank, and on being surveyed, she was reported to be unfit to proceed on her voyage, without a thorough repair, which would cost more than the value of the ship and freight; and which, at all events, could not be had at *St. Kitts*, for want of docks and materials, and that she was unfit to sail elsewhere to be repaired: That the starting of the plank was owing to the iron bolts being rusty and decayed and breaking off in the plank; and that as other bolts might be in the same state, it was concluded that the ship was not at the time she sailed from *Nevis* for *London*, fit to perform that voyage; and this the captain now believed, though, to all outward appearance, she was a good ship, and, as he thought when he sailed from *Nevis*, proper for the voyage; but had he known the decayed condition of her bolts before he sailed on his homeward voyage, he would not have ventured his life in her: That while the ship was at *St. Kitts*, the captain wrote to the plaintiffs, giving them an account of his outward voyage; mentioning the bad weather he had had, and the *loosened, weak, and leaky state of the ship*, and the necessity he was under of having *her upper works new nailed*: That the plaintiffs gave this letter to a broker to get an insurance made on the ship, freight, and cargo; which being shewn to the first underwriter, he chose to insure the ship, saying, she would come home safe enough, notwithstanding the damage she had received, it being a summer voyage; but she would very likely damage her cargo; and being about to underwrite 300*l.* the broker told him he was a bold man to write so much, after reading the letter, upon which he altered the *three* into a *two*: That the broker shewed the same letter to all the other underwriters before they underwrote.—The defendants demurred to this evidence, upon which the court gave judgment for them.—A writ of error was then brought in the *Exchequer Chamber*, which was referred to Lord Mans-

Observations on
the above case.

field and Lord C. J. *Wilmut*, who after argument, reported their opinion to be in favour of the defendants, and judgment was given for them accordingly (a).

The principles upon which this opinion was founded were not publicly declared, because it is not usual, upon a writ of error from the court of *Exchequer* to the *Exchequer Chamber*, for the judges, to whom it is referred, to deliver their opinions publicly. It is evident, however, that it must have been decided on the ground that the ship, at the time she sailed from *Nevis*, was not sea-worthy; and that for this cause, the policy was void, though these things were clear; 1st, That the plaintiffs were innocent; 2dly, That the underwriters, at the time they subscribed the policy, knew as much of the state and condition of the ship as the plaintiff did; and, 3dly, That no blame was imputable even to the captain, or any other agent of the plaintiffs. In the case of *March v. Lord Pigot*, this is alledged by counsel in argument to be the ground of this decision (b). But Lord *Mansfield* is there made to deny it. Little regard, however, seems to be due to this report; not only because the facts of the case of *Mills v. Roebuck*, will warrant a decision in favour of the defendant upon no other ground than that of the ship's not being sea-worthy; but also because Lord *Mansfield* is made in that report, to deny and confirm this doctrine almost in the same breath.

In what cases
the insurer, and
in what cases
the owners, shall
make good the
damage done to
goods from the
insufficiency of
the ship.

Where the goods insured have sustained a damage in the voyage from the insufficiency of the ship, the question, whether the owner or master of the ship be liable to make good the loss, depends on the question whether the ship was in a condition to perform her voyage at the time of her departure, or became defective from

(a) Before this action in the *Exchequer* was brought, an action on the same policy had been tried in the court of Common Pleas, before Lord *Camden*, who directed the jury to find for the plaintiff. But upon a motion for a new trial, he altered his opinion, and the court unanimously determined that the ship, not being sea-worthy, the plaintiffs, however innocent they might be, could not recover.—(b) 5 *Bur.* 2804.

strefs of weather and the perils of the sea, (a). But it is sufficient if the ship be sea-worthy at the time of her sailing. She may cease to be so in twenty-four hours after her departure, and yet the underwriters will continue liable. The question, however, in such cases, will always be, whether her disability arose from any defect existing *before* her departure, or from a cause which occasioned it *afterwards*. But if a ship, within a day or two after her departure, become leaky and foundered at sea, or be obliged to put back, without any visible or adequate cause to produce such an effect, the natural presumption is, that she was not sea-worthy when she sailed; and it will then be incumbent on the insured to shew the state she was in at that time.

It is sufficient if the ship be sea-worthy at her departure.

But if a defect appear soon after her sailing, without any visible cause, the inference is, that she was not sea-worthy when she sailed.

It is unnecessary to make any *representation* of the condition of the ship to the insurer, previous to the effecting of the policy; for it is a rule that no representation need be made of matters relating to the risk which are covered by a warranty (b).

It is unnecessary to make any previous *representation* of the state of the ship.

But a ship, to be sea-worthy, must not only be tight, staunch, and strong, and provided with all necessary stores for the voyage proposed; it is, as has been already observed, a condition or warranty, implied in the contract, that the ship shall be properly *manned*, by persons of competent skill and ability to navigate her. And therefore, if she be suffered to sail in a river, or other place of difficult navigation, without a pilot properly qualified, the underwriters will be discharged; for this is a breach of the above condition.

To be sea-worthy, the ship must be properly *manned*.

Thus: A ship insured from *Stettin* to *London*, took a pilot on board at *Orfordness*, on entering the *Thames*, who quitted her at *Halfway Reach*; after which, and before she came to her moorings higher up the river, she struck upon a ship's anchor, which entered her bottom, in consequence of which she sunk and filled with water before she had been moored twenty-four hours.—In an action on

A ship takes a pilot on her entrance into the *Thames*, but he is permitted to leave her before she is safely moored, and an accident afterwards happens: The insurers are discharged, though it do not appear that the loss was directly imputable to any want of skill

(a). *Vid. Valin* h. t. tom. 1, p. 164.—(b) *Per Cur. Schoobred v. Nutt*, *sup.* 355.

in those who navigated the vessel.

Lew v. Hollingworth, 7 T. R. 169.

the policy, the plaintiff obtained a verdict, and upon a motion to set this verdict aside, and enter a nonsuit, it was objected that there was actual negligence in the management of the ship, by not keeping the pilot on board till she had been moored in safety.—Upon this ground the court were clearly of opinion that the underwriters were discharged.—Lord *Kenyon* said,—“The principle upon which this case must be determined, seems to be admitted on all hands, namely, that the insured cannot recover on a policy of insurance unless the ship be equipped with every thing necessary to her navigation during her voyage. She must be sea-worthy, she must have a sufficient crew, and a captain and pilot of competent skill. But in this case the captain did not perform his duty; for he had no pilot on board when the accident happened. If the underwriters had been previously informed that there would be no pilot on board during a great part of the ship’s passage up the river, probably they would not have undertaken the risk. On the ground, therefore, that there was no pilot on board when the accident happened, I am of opinion that there must be judgment of nonsuit.”

Sect. 2.

Of changing the Ship.

The ship mentioned in the policy cannot be changed unless through necessity, or with the leave of the insurers.

WE have already had occasion to observe that, in almost all cases of insurance upon goods, it is necessary to specify in the policy the ship in which they are to be transported. Without having this ascertained, the underwriter would be unable to form a just estimate of the risk he is to run (a). It is therefore, in general, a part of the contract, that the adventure shall be on board the

(a) Vid. *Ree*. h. t. n. 28. *Santerna*, h. t. p. 3, n. 35; *Stratca*, glos. 8, n. 10, vid. sup. 220.

very ship so specified, and no other. And if, before the commencement of the voyage, another ship be substituted for the one mentioned in the policy, or if, during the voyage, the goods insured be removed into another ship, without any necessity, and without the consent of the insurers, the underwriter is discharged (a)

Some authors have thought that the underwriters are not discharged by a change of the ship, even without necessity, or the consent of the insurers, unless the new ship be worse than that mentioned in the policy (b). So that if the goods insured be removed to as good a ship, the underwriters will remain liable. Others doubt this doctrine (c). But with us, the nature and form of the contract entitle the underwriters to say that they had more confidence in the ship named in the policy, than in any other; and that, therefore, they cannot be bound to run the risk in another, though a larger and better ship, without their consent, or without necessity. Such also is the law of France on this point (d).

Molloy, however, seems to think that the naming of the ship in the policy amounts to an absolute warranty, and that if the goods be removed to any other ship, though from necessity, the insurer is discharged, unless there be a clause in the policy to warrant such removal (e). But this is too rigid a construction of the terms of the policy, and contrary to the constant practice of all commercial countries (f). At present no such clause as that mentioned by *Molloy* is ever found in the policies of any country; and this, of itself, is a sufficient proof that the liberty of changing the ship, in a case of necessity, does not require a special clause to warrant it.

It is not necessary to have a clause in the policy to enable the insured to change the ship in case of necessity.

Lord *Mansfield*, in delivering the opinion of the court in the case of *Pelly v. Royal Ex. Ass.* (g) says,—“ One ob-

(a) *Le Guidon*, ch. 9, art. 4. *Roccus*, n. 9; *Emerig.* tom. 1, p. 423. *Falin*, art. 26, h. t. *Consol. del mare*, ch. 37, § 89. *Mal. lex merc.* 118.—(b) *Roccus*, n. 57. *Straccha de naut.* art. 3, n. 10. *Casaregis disc.* 1, n. 33.—(c) *Vid. Emerig.* tom. 1, p. 424.—(d) *Emerig.* tom. 1, p. 425.—(e) *Molloy*, b. 2, c. 7, § 11.—(f) *Vid. Mal. lex merc.* 118.—(g) 1 *Burr.* 354.

decision was made, by comparing this case to that of changing the ship or bottom on board of which goods are insured, which the insured have no right to do.—Answer: There, the *identical ship is essential*; for that is the thing insured; But that case is not like the present.”—Perhaps it may be inferred from this, that Lord Mansfield meant to lay it down as a rule, without any exception, that the ship can, in no case be changed. The reporter does not state the objection alluded to by his lordship; and the answer in which he is stated to have said, ‘that the identical ship is the thing insured,’ shews that the reporter must have misapprehended him. But, be that as it may, his lordship could only mean to lay down the *general rule*, without stating those exceptions arising from necessity, which the general scope of his argument seems strongly to warrant.

A man insures on any ship he shall come in from A. to B. interest or no interest. The ship he sails in springs a leak, he removes to another, and arrives safe; but the first ship is taken: The insurer is liable.

Dick v. Barrell,
at N. P. 2 Str.
3248.

Observations on this decision.

Yet, where a man insured, “interest or no interest, on *any ship he should come in, from Virginia to London*, beginning the adventure on his embarking on board such ship; the money to be paid, though his person should escape, or the ship be retaken.”—He embarked on board the *Speedwell*; but, the springing a leak at sea, he went on board the *Friendship*, and arrived safe in *London*; but the *Speedwell* was taken after he left her.—Lord C. J. Lee held that the underwriter was liable;—“For,” said he, “the insurance is on the ship the insured set out in: *And had that got safe home* and the other been lost, he could not have recovered upon the ground of having removed his person into that ship in the middle of the voyage.”

On a first view of this case, an inference seems to arise from it, that even necessity will not warrant the changing of the ship. But it is to be observed, that the ground of the decision is expressly stated to have been, that the insurance was on the *ship the insured first sailed in*, and not on his person. Besides, for any thing that appears, the necessity was not great enough to warrant his leaving the *Speedwell*. But, be that as it may, this is but a loose note of a case *at nisi prius*, and is by no means sufficient to establish a principle contrary to constant practice and the

the usage of other countries, and which might be extremely injurious to the interests of commerce.

The point, however, is now clearly settled in the following case, in which it was determined that the shifting of the goods insured from one ship to another, does not discharge the insurer, if this be done from necessity; and that the captain may even dispose of goods saved from shipwreck, and invest the proceeds in the produce of a foreign country, and these being laden on board another ship, will still be protected by the policy.

An insurance was made on the ship *Duras*, "At and from *Marseilles* to *Madeira*, the *Cape*, *Isles of France* and *Bourbon*, and to all places in the *East Indies*, from place to place, during her stay and trade there, and till her return back to *France*, upon any kind of goods and also on the ship."—The plaintiffs were interested in bullion and other goods on board, consigned to their correspondents at *Pondicherry*, with directions to barter or sell the same on their account, and to make the returns to *Europe* in other goods, the produce of *India*.—On the outward voyage the *Duras* was lost at the *Isles of France*. Great part of the bullion, and a considerable part of the goods were saved, but damaged. These, without any authority from the underwriters, were sent forward in another ship to *Pondicherry*, where they were disposed of by the plaintiff's correspondents, who invested the produce in *Indian* goods, and shipped them, on the plaintiffs account, on board the *Père de Famille*, for *France*.—This ship sailed from *Pondicherry* in *August* 1778; but in her voyage home, was condemned, at the *Isles of France*, as unfit to proceed to *Europe*; whereupon the goods were put on board the *Louise*, bound for *France*, which ship was taken by an *English* privateer and condemned. On the 29th of *August* 1778, several underwriters on the policy signed a memorandum thereon, whereby they agreed to run the risk on the goods saved in any other ship or ships till their safe arrival in *France*: But the defendant and several other underwriters refused to sign this agreement.—The defendant paid into court the whole of the average loss occasioned by the loss of the *Duras*. By the

But the ship may not only be changed from necessity, but the proceeds of goods saved from shipwreck may be invested in new goods; and the risk will continue on these in a new ship.

An insurance is made on any kind of goods, and on the ship, from *France* to the *East Indies*, and back to *France*. The ship being lost in the outward voyage, part of the goods are saved and sent in another ship to *India*, and the produce thereof converted into goods there and sent for *France* in another ship, which being disabled, they are put on board a third ship, which is captured.—The risk on the goods saved in the second ship, and also on the goods on the homeward voyage continues; and the insurers are liable for the loss.

Plantamour v. Staples, M. 22 G. III. B. R. MS. 1 T. R. 611, 2.

loss

loss of the *Louise*, the plaintiffs sustained a loss of 12 per cent. on the sum subscribed; which was paid by the underwriters who signed the memorandum, but refused by the rest, and to recover which this action was brought.—The court, upon the above case, were clearly of opinion that the plaintiffs were intitled to recover. Lord Mansfield said,—“The only question is, whether the shipping of the goods to *Europe* was necessary to the salvage. It is admitted that the defendant is liable upon the voyage to *Pondicherry*, though the goods were conveyed in another ship; therefore that circumstance makes no difference. The sale of the cargo is also admitted to have been necessary. Then, how were the proceeds to be remitted to *Europe*? What was the best way of getting home the money for the benefit of the insured and insurers? Beyond all doubt the best way was to invest it in other goods. Therefore, that being done, which was the best which could be done, the underwriters are liable.”—Mr. Justice Buller said,—“There is no case that expressly decides that the captain may invest the produce of the goods saved, in other goods. But in *Mills v. Fletcher* (a), it was decided that the captain has a general power, and is bound in duty, to do the best for all concerned: And what was done in this case was manifestly for their interest.”

When the best is done that can be done for the interest of all parties, the underwriters remain liable.

The captain ought to hire another ship, if it be for the interest of all concerned that he should do so.

If, in the course of the voyage, the ship be disabled, by stress of weather, or any other peril of the sea, the captain ought to hire another vessel for the transport of the goods, and proceed on the voyage, if, under all the circumstances of his situation, it be for the interest of all concerned that he should do so (b).

In

(a) *Doug.* 219, inf. c. 14, § 2.—(b) By the *Rhodian* law, (ff. l. 10, § 1,) the captain is released from all his engagements if the ship, by the perils of the sea, and without any fault on his part, become incapable of proceeding on her voyage. *Vinnius* (p. 295,) says that the captain, in such case, is not obliged to seek another vessel. *Non cogitur aliam querere navem, quia de certe nave alium est.* The laws of *Oleron*, (art. 4.) and

In such case the insurers shall pay all average losses on the goods, the expence of salvage, unloading, warehousing, and reloading, together with all duties that may have been paid, and the increase of freight, if any. In short, they must bear every expence which is the necessary consequence of changing the ship (a).

To what expences the underwriters are liable in such case.

Sect. 3.

Of the Insurance of Goods on board of Ship or Ships.

IN the foregoing section it has been shewn, that by specifying the ship or vessel in which the goods insured are to be transported, it becomes a part of the contract that the adventure shall be on board the very ship or vessel so specified; and that no other can be substituted in her place, unless from necessity, or with the consent of the underwriters (b).

In policies on goods, the ship is generally specified.

It frequently happens, however, particularly in time of war, that merchants have goods in distant countries,

But they may be insured on board any ship or ships.

and those of *Wibuy* (art. 16, 37, 55), say that the captain may hire another ship. The law of *France* (ord. mar. tit. du fret. art. 11.) declares that if the ship be disabled, and the captain cannot get her repaired, he shall be obliged to hire another immediately, if he can procure one.—*Pothier* (des chartes parties n. 68), and *Valin*, (tit. du fret, art. 11, vol. 1, p. 618,) say that this means only that the captain is bound to hire another vessel, if he would earn his whole freight. *Emerigon* (vol. 1, p. 428) holds that the captain being the agent, not only of the owners of the ship, but also of the shippers of the goods, is bound, in the absence of both, to use his best endeavours to preserve the goods and to do all that, in his circumstances, he thinks will most conduce to the interest of all concerned.—In his quality of captain, he has the entire care of the ship and cargo, and is answerable for both. As to the goods, he is bound to do with them, what it may be presumed the shippers would do, were they present. This seems to be the wisest and best rule, and that which Lord *Mansfield* laid down in the above case of *Plantamour v. Staples*, sup. 377.—(a) *Emerigon* tom. 1, p. 432, 576, 681.—(b) *Vid. sup. 220.*

which

which they mean to import from thence, but know not by what ships they may be sent, and their agents are often glad to avail themselves of the first that offer for that purpose. In such cases, it is of great importance that the owners of such goods should be at liberty to insure them, without specifying the ships or vessels they may be shipped on board of,—and then the form of the policy is, upon such goods, ‘on board any ship or ships;’ and this mode of insuring is so well established, both by usage and authority, that the legality of it is now become indisputable (a).

If two policies be made, for different sums, on goods in *ship or ships*, and the goods be put on board two ships, and one is lost; whether the underwriters on both policies shall contribute,

But otherwise if each policy be appropriated to the goods in a particular ship.

Two policies, the one for 6000l. and the other for 4000l. are made on goods on board *ship or ships*, on the same voyage; and goods to the amount of both policies are put on board two ships, though not in those proportions, but it is declared that one is to be covered by the 6000l. policy.—This ship being

If two insurances, for different sums, be made, each on goods on board *ship or ships*, on behalf of the same person, and for the same voyage; and goods amounting to the value in both policies, but in different proportions, be put on board two ships, which sail on the voyage insured; and nothing be done to appropriate either policy to the goods on board of either ship, and one of them be lost; it would seem that this ought to be considered as but one insurance on the entire goods, by two policies, and that the underwriters on both ought to contribute to the loss.

But the following determination will shew that if, in such case, the insured appropriate each policy to certain specific goods on board the respective ships they may be sent by, and one be lost, the underwriters on the policy appropriated to the goods on board of that ship, shall be alone answerable.

The plaintiff in *India* wrote to his correspondent in *England* to get two insurances effected on his account; one for 6000l. on goods on board *any ship or ships* which should sail from *Bengal* to *London* between the first of *November* 1779, and the first of *July* 1780; the other for 4000l. on goods on board *any ship or ships*, which should sail on the same voyage, between the first of *February* and the 31st of *December* 1780. The two insurances were accordingly effected, and the plaintiff loaded goods to the amount of 4889l. on board the *General*

(a) Vid. *Kewley v. Ryan*, 2 H. Bl. 343. sup. 231, inf. 382. *Emerig. tom. 1. p. 173.*

Barker, and to the amount of 4500*l.* on board the *Ganges*; and entered a certificate before the chief justice in *Bengal*, that he had put such goods on board the one, and such on board the other; and that he had shipped on board the *General Barker* (a) 4889*l.* of the risk intended to be covered by the 6000*l.* policy.—Both ships sailed within the time mentioned in the first policy. The *Ganges* arrived safe, but the *General Barker* was lost.—The plaintiff brought an action on the policy for 6000*l.* which he contended he had a right to apply to the *General Barker*, and went for a total loss.—At the trial two objections were made: 1st. That no evidence could be given of the declaration made by the plaintiff in *India*; 2dly. That there ought to be a contribution, and all the underwriters on both policies called upon as for an average loss; and that the plaintiff ought only to recover in the proportion of 4889*l.* to 4500*l.* or, at most, as 4889*l.* was to 1111*l.*—Lord *Mansfield*, who tried the cause, over-ruled the objection as to the evidence, and admitted the declaration in *Bengal* to be read, and was of opinion that by it the plaintiff had fixed the application of the 6000*l.* policy entirely to the *General Barker*, and a verdict was found accordingly.—Upon a motion for a new trial, the court held that plaintiff had a right to apply the 6000*l.* policy to the *General Barker*; but ordered 1111*l.* to be deducted out of the 6000*l.* for what had been saved.—The plaintiff therefore recovered 4889*l.* the value of the goods put on board that ship.

So, if two distinct insurances be made on goods for the same person, and the same voyage; the one on board a specific ship, the other on board *any ship or ships*; and the former arrive safe, but the latter is lost: the insured shall apply the policy on the goods on board *ship or ships* to the goods lost.

lost, the insured shall recover on the 6000*l.* policy only.

Henchman v. Offey, M. 23 G. III. B. R. MS. S. C. 2 H. Bl. 345. n.

A declaration made before a magistrate in *India*, that a particular cargo shall be covered by a particular policy, may be read in evidence here.

If two policies on goods be made on the same voyage; the one on a particular ship; and the other in *ship or ships*; and the latter be lost, the latter policy shall be applied to the goods lost.

(a) In the note of this case in 2 H. Bl. 345, the *Ganges* is here put for the *General Barker*, which is contrary to my note of the case, and obviously contrary to the fact.

Thus:

Kewley v. Ryan,
2 H. Bl. 343.

Thus:—*Freeland* and *Rigby* at *St. Vincent's* wrote to the plaintiffs at *Liverpool* to get 1260*l.* insured on 70 bales of cotton, on board the *Elizabeth*, from *Grenada* to *England*; and also 1300*l.* on cotton which they intended to send by some other ship that would sail by the first convoy, and directed this to be insured by ship or ships.—The plaintiff accordingly got 1260*l.* insured in *London*, on goods on board the *Elizabeth*; and also 1300*l.* on goods on board ship or ships, viz. 700*l.* at *Liverpool*, and 600*l.* in *London*. The policy for 700*l.* on which this action was brought, was, “At and from *Grenada* to *Liverpool*, “on any kind of goods as interest should appear, in “ship or ships, on account of *Freeland* and *Rigby*, warranted to sail on or before the 1st of *August* 1793, and “return 3 per cent. if the ship sailed with convoy, and “arrived; without any exception of the goods on board “the *Elizabeth*.” The policy for 600*l.* effected in *London*, was also on ship or ships; at and from *Grenada* to *Liverpool*, but with an exception of 1260*l.* “on 70 bales “of cotton per *Elizabeth*,” the same underwriters in *London* having before subscribed the policy on the *Elizabeth*. But the plaintiffs did not communicate to the underwriters at *Liverpool*, the letter of *Freeland* and *Rigby* directing an insurance on the *Elizabeth*, nor any circumstance respecting the goods shipped on board the *Elizabeth*, and the insurance made on that ship.—The *Elizabeth* arrived safe at *Liverpool*. The *Heart of Oak*, on board of which the second cargo was shipped, was totally lost in the voyage.—The defendant conceiving that he had a right to apply the policy for 700*l.* on ship or ships, to the goods on board the *Elizabeth*, paid 3 per cent. into court on account of her having sailed with convoy and arrived.—The plaintiff recovered a verdict for the full amount of the defendant's subscription, including the money paid into court.—Upon a motion for a new trial, it was contended, on the part of the defendant, first, that a policy on ship or ships was not a legal policy; and secondly, that, as a ship, answering the description in the policy, arrived safe, having the full amount of the sum insured, the property

property of *Freeland* and *Rigby*, on board; the policy was satisfied. And as every circumstance respecting the specific insurance on the *Elizabeth* had been concealed from the defendant, it was the same, with regard to him, as if no such insurance had been made on that ship. For if the *Elizabeth* had been lost and the *Heart of Oak* had arrived safe, the policy might, by suppressing the letter from *Freeland* and *Rigby*, have charged the defendant with that loss.—But the court were unanimously of opinion, *first*, that the legality of the policy on *ship or ships*, was too well established, both by usage and authority, to be disputed; and *secondly*, that the insured had clearly a right to apply, upon the authority of the foregoing case of *Henchman v. Offley*, such an insurance to whatever ship he thought proper within the terms of it.

By the law of *France*, if an insurance be made *separately* on goods on board several ships named, and the whole are laden on board one ship; the insurer will run only the risk on the sum which he had insured on board that one ship, although all the ships are lost; and he shall return the premium on all but that one, deducting one half *per cent* (a).

Emerigon (b) reports the following decision on this subject.—An insurance for 13,000 livres was made on goods on board the *Amphitrite*, from *Marseilles* to the *French West India Islands*; and from the *French West India Islands* to *Marseilles* or other ports in *France*, upon goods and merchandizes to be laden on board *any French ship or ships* (c).—The *Amphitrite* arrived safe in the *West Indies*, where the captain loaded goods on board five different ships, in different quantities, to the amount of 25,832 livres. Three of the ships arrived safe, but the other two, with goods on board to the value of 15,259 livres, were taken by the *English*.—The insured insisted that the 13,000 livres insured should be considered as part of the 25,832 livres laden on board the five ships, and that the insurers should be condemned to pay the loss, by the rule of pro-

If a certain sum be insured on goods on board *ship or ships*; and goods to a much larger amount be put on board several ships, of which some arrive safe, and the rest are lost; what proportion of the loss the insurers shall bear.

(a) Vid. ord. mar. h. t. art. 32. Valin ib. Pothier, h. t. n. 68. *Le Guidon*, ch. 13. *Emerig.* tom. 1, p. 176.—(b) *Tôm.* 1, p. 174.—(c) *In quovis*, dans un ou plusieurs bâtimens *Francois*, quels qu'ils puissent être.

portion, upon the total.—The insurers insisted that the value of the goods which arrived safe was more than the sum insured; and therefore the policy was satisfied.—The insured replied, that the goods on board the five ships formed one entire mass, consisting of what was insured, and what was not covered by the policy, and therefore the insurers should pay the loss by the rule of proportion.—The insurers were condemned to pay 54 *per cent.* on the sum insured; but upon what principle is not stated:—The proportion which 15,159 bear to 25,832 is nearly 59 *per cent.*: So that, if the rule insisted upon by the insured was meant to be adopted by the court, there must have been a miscalculation in fixing the loss at 54 *per cent.*

If goods be insured on board of several ships, by separate policies, the risk to begin from the goods leaving the shore, and the goods are all sent in one vessel to be put on board the several ships, and this vessel be lost; to what extent the insurers are liable.

Le Guidon (a) puts this case.—A merchant intending to export a quantity of goods in several ships, makes an insurance on each, and sends the whole in a vessel from *Rouen* to *Havre*, to be put on board the different ships, and this vessel is lost in its passage.—The question he makes is, whether the words in the policy, “*courront risque en barques, heus, ou bateaux, qui porteront les dites marchandises à bord,*” shall bind the insurers to pay the several sums insured on each ship.—He thinks the insurers liable only for the greatest sum insured on any of the ships.—*Valin* (b) is not of that opinion. “It is sufficient,” says he, “that it was intended to divide the goods amongst the different ships, according to the terms of the insurance, to make the loss fall on the insurers; for they must at length be carried on board each of the ships; and their being put on board a single bark is of little consequence.”—*Emerigon* (c) on the contrary, thinks that it is of great consequence to the insurer, who has taken upon him the risk of the goods on board several vessels, that they should not be confined to one; and that neither the insured nor his captain has a right to make the condition of the insurer more perilous, by uniting all the risks into one, which, by the contract, ought to be divided. He concludes, however, by observing, that if ever the case should happen, *Valin*’s opinion ought to be followed.

(a) Ch. 13, art. 1.—(b) Sur. art. 32. h. t. p. 79.—(c) Tom. 1, p. 177, 178.

Sect. 4.

Of the Conduct of the Ship.

ANOTHER implied condition relative to the ship is, that she shall be navigated, conducted, and managed according to law; that is, not only according to the municipal law, and the law of nations, but also according to the particular treaties subsisting between the country to which she belongs and other states (a).

The ship must be conducted and navigated according to law.

The ship must, therefore, not only be engaged in a legal trade, but she must carry it on in a legal manner. If the captain be under any legal disability or disqualification, the ship shall not be deemed to be navigated according to law; and an insurance on such ship will be void.

If the captain be under any legal disability, the insurance will be void.

By the statute for regulating the slave trade (b), it is enacted "that it shall not be lawful for any person to become a master of any ship at the time she shall clear out from any port of *Great Britain*, in the *African* slave trade, unless such master shall make oath, and deliver in to the collector of the customs, at the port where such ship shall clear out, a certificate attested by the respective owner or owners, that he has already served in such capacity during one voyage, or as chief mate or surgeon during two voyages, or as chief or other mate during three voyages, in the slave trade; upon pain that the master, and also the owners who employ him, shall, for every such offence respectively, forfeit 500*l*."

By 31 G. III. c. 54, § 7, the master of every ship in the slave trade shall make oath, and deliver to the collector of the port, a certificate, attested by the respective owner or owners, that he has already been master one voyage, or chief mate or surgeon two voyages, or any mate three voyages.

In compliance with this act, it is necessary in the slave trade, that the certificate of the captain's having served as the act requires, should be attested by the owner or

This certificate must be by the owners whom the master has already served, and not by the owners of the ship in the intended voyage.

(a) Vid. Lord Kenyon's judgment in *Christie v. Sacutan*, 8 T. R. 192.—(b) Stat. 31 G. III. c. 54, § 7, originally to be in force only for a year; but annually continued down to the present time.

owners of the ship or ships in which such service was performed; and the following case will shew that a certificate from the owners in the intended voyage will not be sufficient evidence of a compliance with the directions of the act; and that, though a heavy penalty is imposed, not only on the master who serves as such without the qualification prescribed, but also on the owners for employing him, and though the act does not declare the insurance on a ship, having such a master, void, yet the policy was declared void.

The master makes oath that he had been two voyages as chief mate, the owner in the intended voyage certifies that this is true: This is no evidence of a compliance with the act; and the evidence prescribed by the act not being produced to shew that the ship was navigated according to law, the insurance cannot recover for a loss occasioned by an insurrection of the slaves.

Farmer v. Legg;
7 T. R. 186.

An insurance was made on the *Catiz Dispatch*, engaged in the African slave trade, "At and from London to Africa, during her stay there, and from thence to her port of discharge in the *West Indies*."—In an action on this policy, it appeared that the loss was occasioned by an insurrection of the slaves.—On the part of the defendant it was objected, that the ship had not been navigated in the manner prescribed by the above act.—It appeared that the captain had made oath that he had been two voyages as chief mate of the *Sally*, in the slave trade; and the present plaintiff, the owner in the voyage insured, had certified that this was true to the best of his knowledge and belief. But it was insisted that this was not admissible evidence, nor sufficient proof of a compliance with the directions of the act, which was made to compel the owners of vessels engaged in this traffic to employ experienced commanders, as one means of insuring to the slaves a more judicious and humane treatment during their passage to the *West Indies*: That the statute, by directing the oath and certificate therein mentioned to be deposited in the hands of the collector of the customs, had prescribed the species of evidence by which alone a compliance with its regulations could be proved, and that the certificate required by the act was a certificate by the respective owner or owners during the former voyages, and not, as in the present case, by the owner in the intended voyage.—Lord *Kenyon*, before whom the cause was tried, being of opinion that

that the certificate did not answer the requisition of the statute, nonsuited the plaintiff.—A motion being made to set aside this nonsuit and grant a new trial, on the ground of a misconstruction of the act of parliament, the court were unanimously of opinion that the certificate ought to have been from the owners of the ships in which the qualification was obtained, who must be best acquainted with the fact, and capable of certifying from their own knowledge.

The sentence of a foreign court of admiralty condemning a ship as prize upon the express ground that she had violated a treaty subsisting between the country to which she belonged, and the belligerent by which she is condemned, is conclusive evidence to prove that she had not failed according to law, and so to discharge the underwriters. But the following decision will shew, that if a neutral ship be condemned, *as being enemy's property*, and one of the reasons assigned for this in the sentence is, that she had not the proper documents required by treaty on board; this shall not be conclusive evidence to prove that the ship had not failed according to law; for the only point which the sentence professes to *decide* is, that the ship was enemy's property.

An insurance was made on goods on board the *Peggy*, on a voyage "From *Maryland* and *Virginia*, both or either, "to *Bremen*."—The policy was subscribed on the 31st of *May* 1797, and on the 2d of *June* following, the underwriters subscribed a memorandum, written on the policy, in these words,—“The destination of the *Peggy* having been altered, we agree to stand our respective risks in the goods insured on this policy *per The Mercury*, direct from *Virginia* to *Bremen*.”—An action was brought on the policy for a total loss of the goods on board the *Mercury*, and for expences incurred in a suit by the plaintiff for the recovery of the property insured.—On the trial of the cause it appeared, that the *Mercury* was, in fact, an *American* ship, and had on board, at the time of her capture, all such papers and documents as are usually carried on board *American* ships, or which the

Though a sentence of condemnation, on the express ground that the ship had violated a treaty, be conclusive to shew that she did not fail according to law; yet, if this be only recited as a fact, and the ground of the sentence be that the ship was *enemy's property*, the sentence will not be conclusive.

An *American* ship is captured by the *French*, and condemned as prize because she was looked upon as belonging to the enemy.

Among other reasons stated in the sentence from which this conclusion is drawn, it is recited as a fact, that the ship had not all the papers required by the treaty between *France* and *America*.

The ground of this sentence being that the ship and cargo were *enemy's property*, it is not conclusive

evidence to prove that the ship had acted in contravention of the treaty.

Christie v. Secretary, 8 T. R. 192. sup. 300.

French themselves deemed necessary in former voyages. There was also a muster-roll on board, but not signed or certified by any public officer of the place from which the ship sailed.—No warranty was made to any of the underwriters on the subject: On the contrary, the broker, though he spoke of the ship as an *American*, told the underwriters that he was directed not to warrant any thing.—On the 20th of *May* 1797, the ship sailed with the goods on board from *Virginia* on the voyage insured, and on the 22d of *June* following was captured by a *French* privateer, and taken into *Nantz*.—The proceedings being instituted before the commercial tribunal there, the following sentence was pronounced by that court.—“Considering that the 4th article of the decree of the 3d *Brumaire*, 4th year, declares good prize, All *American* ships which shall not have on board a muster-roll in due form, such as is prescribed by the form annexed to the treaty of the 6th of *February* 1778; and that the muster-roll of the ship *Mercury* is not conformable to that form, or to that ordered by the decree of the *Directory* of the 12th *Ventose*, 4th year, it being neither dated or signed by any public officer of the *United States*: Considering that the bill of lading of 255 hogheads of tobacco found on board, was not signed by the captain, is contrary to the 9th article of the marine ordinances, whereby it is declared, that all vessels on board whereof no charter-party, bills of lading, or invoices, are found, shall be decreed good prize, together with their cargoes, as also the 9th regulation of the 21st of *October* 1744, declaring all bills of lading not signed null and void: Considering that there were other goods on board of which there were no bills of lading or invoice; that the captain has produced no *American* protection, and that, it appears that he is an *Irishman*, and has a wife and children in *Ireland*—the tribunal, in conformity with the above laws, adjudges and declares the validity of the prize of the ship *Mercury*, and of the goods and effects on board, for want of the dispatches and sea papers of the captain being in regular order; on which ac-

counts

count *she is looked upon as belonging to the enemies of the French republic*; the same being agreeable to the 7th article of the marine ordinances of 1681."—Upon this case it was insisted on the part of the defendant, that though there was no warranty that the ship was *American*, yet, being in fact *American*, she ought to have had all those documents which are necessary for the protection of an *American* ship, whether required by the law of nations, or particular treaties, the want of which subjected her to additional risks; there being a warranty implied in every contract of insurance, *that the ship shall be navigated according to the laws of the country to which she belongs and to which she is going (a)*.—But the court determined that the plaintiff was intitled to recover.—Lord Kenyon said,—"In deciding this case I do not mean to deny that the ship insured must be navigated, not only according to the law of nations, but also according to the particular treaties subsisting between the country to which she belongs and other countries.—In general there can be no doubt but that the sentence of a court of admiralty is conclusive, *as to the points which it professes to decide*. It was so ruled in *Hughes v. Cornelius (b)*, and that has been acknowledged to be law ever since. But the sentence of such a court is *only conclusive* on the points which professes to decide; and the only question in this case is, what point the French court of admiralty has decided. Now the sentence recites many facts into which it is not necessary to enquire (*c*); but the sole reason given for the adjudication, at the concluding part, does not affect the case before us. If the ship and cargo had been condemned for having violated any treaty between *France* and

A ship insured must be navigated, not only according to the law of nations, but also according to the particular treaties subsisting between the country to which she belongs, and other countries.

(a) The authorities cited in support of this proposition were the case of *Law v. Hollingworth*, 7 T. R. 160, sup. 373, and *Farmer v. Legg*, 7 T. R. 186, sup. 386.—(b) 2 Show. 232.—

(c) The adjudication must be supposed to be the necessary consequence resulting from the facts found; and the facts recited in the sentence must have been found by the court, otherwise the sentence of condemnation would have been without foundation.

America, we should not have been able to extricate ourselves from the effect of such a sentence. But the short ground on which I proceed in this case is, that the condemnation is expressed, at the conclusion of it, to be, because "the ship belonged to the enemies of the *French* republic (a)." We cannot now enquire whether *France* and *America* were at enmity with each other. The foundation of the sentence is that the ship belonged to the enemies of the *French* republic, and not because the ship had not the proper documents on board. Mr. Justice *Große* said,—“I agree that it was necessary for this ship to have on board all those documents that an *American* ship ought to have; and that the want of them would have discharged the underwriter. Now the sentence does not proceed on the want of any such documents, but on the express ground that the ship belonged to the enemies of the *French* republic. We can only look to the foundation of the sentence, and not to the previous reasons there stated.”—Mr. Justice *Lawrence* said,—“In the course of the argument, many things, I think, were taken for granted, to which I cannot assent. Among others, it was said, that the ship insured must be navigated according to the laws of the countries from and to which she sails: But that proposition, I rather think is not supported, in its extent, by the cases. It is true that if the insured bring an action here on a policy of insurance, effected contrary to the law of this country, he cannot recover: But I do not know that the cases have gone the length of deciding that no action can be maintained here on a policy made contrary to the revenue laws of another country (b). I doubt also whether there be any analogy between

Whether the ship insured must be navigated according to the laws, both of the country to which she belongs, and of that to which she is bound.

(a) The words of the sentence, as translated in the report, are; “On which account she is looked upon as belonging to the enemies of the *French* republic.”—(b) The cases of *Holman v. Johnson Cowp.* 341, and *Biggs v. Lawrence*, 3 T. R. 454, shew that a contract is not deemed void by the law of *England*, merely because it is made in contravention of the revenue laws of a foreign state; and in the case of *Lever v. Fletcher*, sup. 54, Lord *Mansfield*

between a case like the present and cases where there is an implied warranty of sea-worthiness. The latter is implied from the nature of the contract. But that is not the case of a ship wanting the proper documents on board. She may, nevertheless, perform her voyage; at least there is no certainty that she will not, as there is in the other cases alluded to. I have merely thrown out these doubts in consequence of what fell from the counsel in the argument, without meaning to give any decisive opinion upon these points. It has been contended, however, on the part of the defendant, that the ship in question was condemned for not having on board those papers that are required by the treaty between *France* and *America*; and if that had been the express ground of the sentence, I should have found great difficulty in resisting its effect, as applied to this action: But that is not the ground of their decision. They have stated, indeed, many things that induced them to draw the conclusion *that she was the property of an enemy*; but that is the ground of the sentence. We must consider the sentence as conclusive on that point, without examining the premises that led to that conclusion."

Mansfield says, that no country pays attention to the revenue laws of another; and he lays it down as law, that if an insurer enter into the contract, with full knowledge that the insurance is meant to protect a smuggling trade with a foreign country, then it is a fair contract as between the parties.—See ch. 3, § 1. When this subject is fully considered.

C H A P. XII.

Of Deviation.

BY deviation is here meant a voluntary departure, without any necessity, from the usual course of the voyage insured. From the moment this happens, the voyage is changed, the contract is determined, and the insurer is discharged from all subsequent responsibility. By the terms of the contract, the insurer only runs the risk of the voyage agreed upon, and of no other; and it is therefore a condition necessarily implied in the policy, that the ship shall proceed by the shortest and safest course to her port of destination, and on no account to deviate from that course, but in cases of necessity (a).

We will consider the subject of deviation under the two following heads;

1. What shall amount to a deviation that will discharge the insurers;
2. What are the cases of necessity that will justify a deviation.

Sect. 1.

What shall amount to a Deviation that will discharge the Insurers.

The course of the voyage does not mean the nearest possible way, but the usual and regular course. Stopping at certain places in the voyage, is no deviation, if it be customary to do so.

By the course of the voyage is not meant *the shortest possible way* from the port of departure to the port of destination; but the regular and customary track, if such there be, which long usage has proved to be the safest and most convenient. And therefore the stopping at certain places in the course of a voyage, though out of the direct line, is not a deviation, but a part of the voyage, if it has been the usual and settled practice, to

(a) Periculum intelligitur solum currere asecurator, pro illo itinere convento, et non pro alio. Nam si navis mutaverit iter, vel a viâ rectâ illius itineris diverterit, non tenetur amplices asecurator. *Roccus*, n. 52. *Vid. Emerig. tom. 2, p. 5. Doug. 278.*
 stop

stop at those places. For whatever is usually done, is presumed to be foreseen, and to be in the contemplation of the parties, and is therefore understood to be referred to by every policy, and to make a part of it as much as if it were expressed (a).

But evidence of a few instances will not be sufficient to establish such an usage. It can only be supported by long and regular practice. And therefore, if a ship, in a voyage from *Liverpool* to *Jamaica*, put into the *Isle of Man*; and some instances appear of ships, in this voyage, putting in there; but no regular or settled practice to do so appear: This will not excuse the deviation; but the insurers will be discharged (b).

But a few instances will not make such an usage.

The effect of a deviation is not to vitiate or avoid the policy, but only to determine it from the time of the deviation, and to discharge the insurer from all subsequent responsibility. If, therefore, a ship, after her departure, receive damage, then deviate, and is afterwards lost; though the insurer is discharged from the time of the deviation, and is not answerable for the subsequent loss; yet he is answerable for the damage received before the deviation (c). But though he is thus discharged from subsequent responsibility, yet he is intitled to retain the whole premium.

Effect of a deviation.

A person unacquainted with the nature of this contract, might, at first view, be tempted to think that if, after a deviation, the ship resume her proper course, still being in good condition, and capable of performing the voyage, such a deviation ought not to alter the rights of the parties, or deprive the insured of the benefit of the policy.—But the answer is, that the condition implied in the contract, that the ship shall not deviate without necessity, being broken by the insured, the insurer is discharged. The proper course of the voyage being once interrupted,

It determines the contract, though the ship resume her proper course, and in a condition to complete the voyage.

(a) Per Lord Mansfield, in *Pelly v. Roy. Ex. Aff.* 1 Bur. 348, sup. 182.—(b) Vid. *Bond v. Nutt*, Cowp. 601, sup. 255.—(c) Per Holt, C. J. *Green v. Young*, at N. P. 2 Lord Ray. 840. 2 Salk. 444.

cannot be resumed in the eyes of the law. The contract being once dissolved, cannot be renewed without the consent of both parties; and if a loss happen after a deviation, who can say that the ship would not have arrived safe if she had pursued the usual course?

The smallness of a deviation makes it not the less fatal.

The shortness of the time, or of the distance, of a deviation, makes no difference as to its effect on the contract. Whether it be for one hour, or a month; or for one mile or one hundred, the consequence is the same. If it be voluntary, and without necessity, it puts an end to the responsibility of the insurer. The true reason why a deviation discharges the insurer is, not the increase of the risk, but, that the party contracting has voluntarily substituted another voyage for that which was insured (a).

A ship puts into a port not in the usual course of the voyage, though it lies in her way. This is a deviation.

Fox v. Black, at N. P. 1767.
Beawes 315.

S. P. Townson v. Guyon, at N. P. *Beawes* 315.

Therefore, where an insurance was made on a vessel "from *Dartmouth to Liverpool*;" and the vessel, in her passage from *Dartmouth*, put into *Loe*, a place she must of necessity pass by, in the course of the voyage insured: Though no accident befel her in going into, or coming out of *Loe*, but she was lost after she got out to sea again; Mr. Justice *Rates* held that this was a deviation.

So, where goods were insured from *Dunkirk to Leghorn*; and the ship came to *Dover*, in her way, to procure a *Mediterranean* pass; and being afterwards lost, Lord *Mansfield*, in an action on the policy, held that the calling at *Dover* was a deviation, which discharged the underwriters.

A ship having liberty to put into one port; puts into another equally in her way; This is a deviation, and fatal to the contract, though neither the risk or the premium would have been greater if it had been allowed by the policy.

Elliot v. Wilson, 7 Bro. Parl. Ca. 459.

So, where an insurance was made at *Glasgow* on fourteen hogsheads of tobacco, "beginning the adventure" from the loading thereof at *Carron*, and to continue "till the ship, (being allowed a liberty to call at *Leith*), shall arrive at *Hull*, and there be safely delivered"—The instructions of the insured to the broker directed him to make the insurance, "with liberty to call as usual," and it was usual for vessels sailing from *Carron*, with goods on freight, to *Hull*, in going down the *Firth of Forth*, to touch at different places, to take in or deliver goods; particularly at *Burrowstoness*, and *Leith*, and at *Morri-*

(a) Vid. *Lavabre v. Wilson*, sup. 186.

son's Haven, six miles down the *Frith*, on the same side with *Leith*. The insured were not privy to the allowance "to call at *Leith*," being substituted in the policy for the more general liberty, "to call as usual." The premium was equal if not higher, than was usual where the general liberty, to touch at the customary ports, was allowed. The ship sailed on the 4th of *February* 1774, did not touch at *Leith*, but put into *Morrison's Haven*, sailed from thence on the 9th, got safe into the direct course from *Carron* to *Hull*, and proceeded with a fair wind, till the 10th, when she was overtaken by a storm, wrecked on the coast of *Northumberland*, and the cargo totally lost.—The underwriters on hearing of the loss, conceiving themselves liable, wrote orders to have the tobacco preserved and sent to *Hull*, promising to contribute towards the expence as far as they were interested. Afterwards, however, they protested against the ship's having gone into *Morrison's Haven*, as being a deviation, and refused payment of the loss.—An action was brought by the insured in *Scotland*, and, after a variety of proceedings in the courts there, which would neither be very intelligible, or very instructive, to an *English* reader, the underwriters were decreed to pay the amount of the loss. But the House of Lords, upon appeal, reversed that judgment, being of opinion that a wilful deviation from the due course of the voyage insured, is, in all cases, a determination of the policy: And that it is immaterial from what cause, or at what place, a subsequent loss happens; for, from that moment of the deviation the underwriters are discharged. That there was, in this case, a wilful deviation; and though ships sailing on this voyage, have sometimes been permitted, by the terms of the policies underwritten at the same premium, to go into *Morrison's Haven*, yet that could not avail in the present case, since here no such permission was given.

If there be several ports of discharge mentioned in the policy, the ship must go to those places in the order in which they are named, unless some usage or particular facts appear to vary the general rule.

If there be several ports of discharge mentioned in the policy, the ship must go to them in their order.

Thus:

A ship is insured from *A.* to *B.* and from thence to *C.* and *D.* the ports of discharge. The ship goes to *D.* before *C.* This is a deviation.

Beaton v. Harworth, 6 T. R. 531.

Thus :—An insurance was made on a ship, “ At and from *Fisberow* to *Gathenburgh*, and back to *Leith* and *Cockenzie* ; ”—The ship performed her voyage outward to *Gathenburgh*, and having taken in goods both for *Leith* and *Cockenzie*, on her return home, without going to *Leith*, she first put into *Cockenzie*, where she was stranded and lost.—In an action on the policy, evidence was given to shew, that *Leith* was a very safe and commodious harbour, and *Cockenzie* a very small and insecure one, especially in the winter ; that the two places are about ten miles from each other ; but *Cockenzie* lies nearest to *Gathenburgh*, and it is about a mile and a half out of the way to put into *Cockenzie*, in going from *Gathenburgh* to *Leith* ; that, though there was no settled course to regulate this voyage, yet it was safest to go first to *Leith* ; for, by discharging the lading for *Leith*, the risk of going into *Cockenzie* was much lessened.—Upon this case, the court determined, that as the intended voyage was described in the policy, and as there was no regular and settled course, known to all the traders, different from that so described, the ship deviated by putting into *Cockenzie* first, and consequently, that the plaintiff could not recover.—One of the judges added, that the parties, by inserting the names of the places contrary to the natural order in which they lay in the ship’s course, shewed it to be their *intention* to vary the natural course of the voyage.

Though the ports of discharge be not specified, yet the ship must take them in their geographical order, as they occur.

A ship is insured from *London* to her ports of discharge in the *Streights*, with power in the voyage to stop at any places

And the following case will shew, that though the ship’s ports of discharge are only mentioned generally, but not specifically named in the policy, yet the ship must go to them in the geographical order in which they occur ; and taking them out of that order, unless this be warranted by usage, will be a deviation.

An insurance was made on goods, “ At and from *London* to the ship’s ports of discharge in the *Streights* as high as *Messina* ; with power in the voyage to stop or stay at any ports or places whatsoever.”—The ship was freighted with lead from *London* to *Marseilles*, and went into

into *Falmouth*, where she staid three weeks, and took in a freight of tin for the same place. Before she went from *London*, the plaintiff, who was owner of the ship, declared that she was to go directly to *Genoa*, *Leghorn*, and *Naples*, and there was nothing said about *Marfeilles*. When she was off *Marfeilles*, the wind was against her, and she could not then get in, but went to *Genoa*, and from thence to *Leghorn*, and in coming back to *Marfeilles*, she was attacked by a privateer, and blown up.—In an action on the policy, it was proved by several captains, and so held by Lord Chief Justice *Lee*, 1st, That the going into *Falmouth*, and staying there was a deviation; 2dly, That as she did not stop at *Marfeilles*, this was acting contrary to the terms of the policy; for by her ports of discharge must be understood, the ports at which it was intended goods should be delivered, and the first of them was *Marfeilles*,—3dly, It was sworn by several captains to be their opinion, (but the Chief Justice said nothing on this point), that the going no further in the *Streights* than *Leghorn*, and then returning, was a determination of the insurance at *Leghorn*; and the insurers discharged from the subsequent loss. Upon this there was a verdict for the defendant.

The following decision proceeded on the same principle.—A ship was insured, “At and from *Lisbon* to a port in *England*, with liberty to call at any one port in *Portugal*, for any purpose whatsoever;” and the ship sailed from *Lisbon* to *Faro*, to complete her loading; *Faro* being a port to the southward of *Lisbon*, and therefore quite out of the course of the voyage to *England*.—In an action on the policy, Lord *Kenyon* was of opinion that the liberty given by the policy to call at any one port in *Portugal*, must be restrained to a permission to call at some port to the northward of *Lisbon*, in the course of the voyage to *England*; and that going to the southward was a deviation which discharged the underwriters.

Yet, if a ship be compelled by any necessity to change the order of the places to which she is insured, this is not a deviation.—As where a ship was insured from *Lisbon* to *Madeira*, from thence to *Saffi*, on the coast of *Africa*,

whatsoever; and she goes first to *Genoa*, then to *Leghorn*, and lastly to *Marfeilles*: The voyage ends at *Leghorn*, and the insurers are discharged.

Clafon v. Simmonds, at N. P. cited by Mr. Justice *Lawrence*, 6. T. R. 533.

A ship is insured from *Lisbon* to *England*, with liberty to call at any one port in *Portugal*. This gives only a liberty to call at some port in *Portugal* in the course of the voyage to *England*.

Hogg v. Horner, at N. P. after Mich. 1797. MS.

Yet if a ship be compelled by necessity to alter the order of the places, this is no deviation.

Driscoll v. Bovil,
1 Bos. & Pul.
313, sup. 190.

Africa, and back from thence to *Lisbon*; and upon her arrival at *Madeira*, the crew being alarmed by reports of *Moorish* cruizers being off *Saffi*, quitted the ship and refused to return to her unless the captain would promise to sail immediately back to *Lisbon*. The captain complied; but on his arrival at *Lisbon*, the charterers insisted on his proceeding directly to *Saffi*; which he accordingly did, and was captured on his return from *Saffi* to *Lisbon*.—It was determined, that there was no deviation in this case, and that the underwriters were liable for the loss.

The clause giving liberty to touch, stay, trade, &c. must always be interpreted as subordinate to the voyage insured.

Clauses are very frequently introduced into policies, giving liberty to the insured to touch, stay, trade, &c. at any ports or places, in the course of the voyage; and as these clauses are often inserted as a matter of course, and without much consideration by either party, it is necessary that they should be understood with such restrictions as the courts in different countries have thought necessary to be imposed on them, in order to prevent any unfair advantage being taken of the general words in which they are usually expressed. They are therefore always interpreted as subordinate to the voyage insured, which is the principal object of the contract; and in cases of doubt, they must be understood with reference to the laws of commerce and the usage of the particular trade. If, therefore, there be in the policy a liberty to touch, stay, and trade at any ports and places in the voyage; such a liberty, however, general the words may be, does not give the captain a power to change the regular course of the voyage insured, which he must keep constantly in view: It only extends to the ports and places in the usual and ordinary course of the voyage (a).

And however general they do not give the captain a power to change the voyage, but only to extend it to places in the usual course of the voyage.

Thus :

(a) *Casaregis*, (disc. 67, n. 25.) observing that the captain in the exercise of this liberty ought never to lose sight of the voyage insured, says, “Clarum est verba apodixæ securitatis committere voluntati patroni totum itineris decursum; ita ut in ejus arbitrio regulato tamen à jure et ratione, repositum sit quascumque scalas, quoscumque portus ingredi, antecedere in viâ, & retrocedere prout exigunt necessitas et opportunitas, sed semper

Thus:—An insurance was made, “At and from Port L’Orient to Pondicherry, Madras, and China; and at * and from thence back to the ship’s port or ports of discharge in France; with liberty to touch in the outward * or homeward bound voyage, at the Isles of France and * Bourbon, and at all or any other place or places where- * soever.”—There was also a clause in the policy, “That the ship in this voyage might proceed to, and touch, and * stay, at any ports or places, as well on this, as on the * other side, of the Cape of Good Hope, without its be- * ing deemed a deviation.”—The ship arrived at Pondicherry, and, after remaining there a month, sailed for Bengal, instead of going to China. Having wintered and undergone a repair there, she returned to Pondicherry. Both in going and returning, she touched at, and took in goods, or lay off, several places; and thus prolonged her voyage to and from Bengal much beyond the usual time. Having taken in her homeward cargo at Pondicherry, she proceeded on her voyage back to L’Orient, but was captured by an English privateer.—In an action on this policy, one question was, whether the voyage to Bengal was

A ship is insured from France to Pondicherry and China, and back to France; with liberty to touch and stay at ports and places, &c. This will not cover a voyage to Bengal.—A liberty to touch and stay at any ports and places means, ports and places in the usual course of the voyage.

Lavabra v. Wilson and Latubra v. Watson, Doug. 271.

semper animo, et intentione prosequendi viaggium usque ad finem destinatum.”—The same doctrine is laid down by *Emerigon* (tom. 2, p. 32, and seq.), and he exemplifies it by the following cases.—1. An insurance was made on a voyage from *Bourdeaux* to the *Levant* and back, with liberty to the captain, “de toucher et retrogader per tout ou il lui plairoit.” The ship sailed to *Cádiz*, where she was lost.—It was determined that the liberty given by the above clause was subordinate to the voyage mentioned in the policy; but that here the voyage was changed, and the insurers discharged.—2. A voyage was insured from *Leighorn* to *Havre de Grace*, with liberty “de toucher par tout, avant, arriere, à droit et à gauche, &c. The ship sailed up the *Loire* to put into *Nantes*, and was lost.—It was held that the insurers were not answerable for the loss, because the above clause only gave liberty to touch at the usual places in the course of the voyage insured; but not to increase the risk by going up the river beyond the place of destination.

insured

insured by the policy, under the general liberty to touch and stay at any ports or places?—Upon this point Lord Mansfield, who tried the cause, held clearly, that these general words were, by the expressions “outward and homeward-bound voyages,” and “in this voyage,” qualified and restrained so as to mean only places in the usual course of the voyage to and from the places mentioned in the policy. It was then alledged on the part of the plaintiff, that the voyage to *Bengal* was adopted by necessity, for the safety of the ship:—And to prove this, witnesses were called to shew that the ship was so leaky at *Pondicherry*, that she appeared to require careening, which could only be done at *Bengal*, that being the nearest place to which she could proceed with safety for that purpose: That though it turned out, when she got to *Bengal*, that she could be repaired without careening, yet this was only discovered after she was unloaded of much more of her contents than could have been taken out of her in the open road of *Pondicherry*: That, besides the necessity of repair, she was delayed in unloading the outward cargo at *Pondicherry*, till it was too late to undertake the *China* voyage with safety; and *Bengal* was then the safest place to winter at.—The defence relied upon was, 1st, That the ship had never failed on the voyage insured, her true and original destination having been *Bengal*, and not *China*. 2dly, That, supposing her to have failed on the voyage described in the policy, yet, her going from *Pondicherry* to *Bengal*, instead of proceeding to *China*, was a deviation, and not justified by necessity. In support of the first ground of defence, secret instructions, found on board the ship, were relied upon, which, though obscurely penned, gave room to suspect either that before her departure, the *Bengal* voyage was substituted for that to *China*; or at least that this alternative was left to the discretion of the supercargo, to be decided by events in *India*, which actually happened, so as to determine the voyage to *Bengal*.—On the second ground, it was contended, that from the plaintiff’s evidence it appeared that there was no necessity for going to *Bengal*; and that instead of going thither directly, a trading voyage had been made,

made, which afforded a strong presumption that trading, and not the leak, or lateness of the season, was the object of going to *Bengal*: Several letters written by the owners also raised a presumption that the necessity of going to *Bengal* was a pretence devised after the capture, when it was feared that the policy would not cover the voyage to that place.—Lord *Mansfield* summed up strongly against the plaintiff on the ground of fraud. But independent of that, he said that if necessity were admitted to have been the sole motive for substituting the voyage to *Bengal* in the place of that to *China*, still it was incumbent on the insured to have pursued that voyage of necessity directly, in the shortest and most expeditious manner; and that the delay in going from *Pondicherry* to *Bengal*, and the repeated stops by touching at different places, and trading there, were deviations, and not within the protection which the supposed necessity afforded to the direct voyage to *Bengal*.—The jury, notwithstanding this direction, found a verdict for the plaintiffs, which was afterwards set aside, and a new trial granted, upon the following grounds:—That a deviation from necessity must be justified both as to the substance and manner; and nothing more must be done than what the necessity requires:—That the true reason why a deviation discharges the insurer, is not the increase of the risk; but, that the party contracting has, without necessity, substituted another voyage for that which was insured: That the necessity of the voyage to *Bengal* did not prove the necessity to trade; or to touch at a number of ports all out of the direct course, or to consume six weeks or two months, instead of six days.—The plaintiffs afterwards submitted to the opinion of the court, and abandoned their claim against the underwriters (a).

The reason why a deviation discharges the insurer.

Nothing

(a) *Emerigon* (tom. 2, p. 62), has given a translation of this case, to which he adds some remarks which have been already mentioned, sup. 29. He adds, that having been consulted on this case by *Lavabre, Doerner* and company, bankers at *Paris*, who had lent 180,000 livres on bottomry on the ship and cargo,

A letter of marque is not at liberty to cruise in quest of prizes. But she may give chase to an enemy which comes in her way.

Nothing will justify a wilful deviation, but a real necessity to deviate; and therefore, if a letter of marque leave the convoy to which she belongs, and cruise in quest of prizes, though but for a single night; this will be a fatal deviation (a).

But though a ship cannot, without deviating, cruise in quest of prizes, yet if an enemy come in the way of a ship having letters of marque, she may give chase to the enemy, and in so doing, shall not be deemed to have deviated.

A letter of marque chases an enemy and then loses sight of her in the night, and in the morning engages her; this is no deviation.

Jolly v. Walker,
at N. P. East.
Vac. 1781.
Beawes, 316.

Thus:—A ship, having letters of marque, was insured, “At and from *London to Cork* and the *West Indies*.”—The ship in the night, descried a ship of the enemy, and after chasing, lost sight of her for six hours, and till the morning, when they engaged. She did not take the enemy, but proceeded on her voyage and was afterwards captured: It was agreed on all hands, that though a ship, in such circumstances, could not cruise, yet it was admitted by the underwriters, that if an enemy came in her way, she might engage, or defend herself, but they contended that, if she lost sight of the enemy, it was no longer chasing, but *cruising*.—Lord *Mansfield* left it upon the evidence to the jury, who found for the plaintiffs.

In the note of this case, which seems a very defective one, it is not stated whether the letter of marque, after she lost sight of the enemy in the night, continued cruising for her till the morning, or resumed her course to the *West Indies*.

and were the insured in the *English* policy, he answered 1st, That *Berard* and company, the borrowers, having broke their contract, it was just that they should suffer the loss occasioned by their contravention of it. 2dly, That, by changing the voyage, the lenders on bottomry, as well as the insurers, were discharged from the perils of the sea; and consequently that *Lavabre, Doerner* and company were intitled to recover from *Berard* and company the 180,000 livres lent on bottomry, together with the marine interest and the interest incurred since the same became due.—(a) Per Lord *Camden*, C. J. in *Cock v. Townson*, at N. P. *Beawes*, 316.

dies, and fell in with the enemy again by accident. Probably that was the question left to the jury: If so, the inference will be that a *cruising* in hopes of meeting the enemy again, after she had been lost sight of, would have been a deviation, though *chasing* her was not.

Sometimes a policy on a ship of force, with letters of marque, contains a clause giving liberty to cruise for a certain term in the course of her voyage. The following case will shew, that if it be meant that this term shall consist of different periods of time, taken separately, it ought to be so expressed; otherwise the cruise will be taken to be for one continued period of time, and not for several periods amounting to that time.

A letter of marque was insured, "At and from *Liverpool* to " *Antigua*, with liberty to cruise for six weeks, and to re- " turn to *Ireland*, or *Falmouth*, or *Milford*, with any prize " or prizes."—This policy was made on the 9th of *February* 1779, and there was no time fixed in it for the commencement, or duration, of the voyage. The ship, in fact, sailed from *Liverpool* on the 28th of *February*, and kept on her direct course till the 14th of *March*, chasing, however, at different times, from the 7th to the 14th, when she began to cruise, the captain giving notice thereof to the crew, and ordering a minute of it to be made in the log-book. She continued to cruise about the same latitude, till the 18th of *April*, and then discontinued it, and the captain again gave notice, intending to go to the *Burlings* off *Lisbon*, in the course of the voyage. On the 23d, she renewed the cruise, of which the captain gave notice as before, and continued it till the 28th, when she was taken by an *American* privateer.—An action was brought on the policy, and, upon the trial, the captain swore that before he sailed the policy broker, (whom he considered as acting for both parties), told him that he might cruise in any latitude, and at different times, mentioning in his log-book, when he should begin and end; and if the amount of the different times, when added together, should not exceed the six weeks, the terms of the insurance would be complied with.—Witnesses were called on the part of the defendant, who con-

A liberty to cruise for a certain time in the voyage is to be taken as one continued period.

A letter of marque is insured for a voyage with liberty to cruise for six weeks, but no time mentioned for its commencement: The ship may cruise six successive weeks, but not at different times.

Syers v. Bridge, Dougl. 509.

curred in thinking that, by the terms of the policy, the cruise ought to have been for six successive weeks; not interruptedly and at intervals.—On the other side, witnesses were examined, who thought, on the contrary, that the policy did not import any such restriction. But this was admitted, on both sides, to be only matter of *opinion*.—A verdict was found for the plaintiff, with liberty to the defendant to move for a new trial.—Upon that motion, the court determined that the liberty to cruise for six weeks, meant six *successive* weeks from the commencement of the cruise, and therefore, that cruising *at different times* was a deviation which discharged the underwriters.—Lord Mansfield said;—“This was merely a question of construction, on the face of the policy; and, unless an usage could have been shewn in favour of this desultory cruising, calling witnesses to support it, was calling them to mere *opinion*. None of those produced knew of any *instance*, and therefore their evidence ought not to have been received: Yet, I dare say, their testimony had great weight with the jury. The meaning of words depends on the subject. The instructions were not read; but they shew the meaning very clearly, for they run thus: “To cruise six weeks, and *then* proceed “to *Antigua*.” There can be no general rule. Here the subject matter, in my opinion, is decisive to shew that the six weeks meant one continued period of time. There are frequently articles for a month’s cruise, a six weeks cruise, &c. Such a liberty, as in this case, to a letter of marque, is an excuse for a deviation. But what is contended for by the plaintiffs is impossible in practice. Suppose the ship returns *directly back*, after cruising for the space of a week. She may then, perhaps, take three weeks to return to where she had been. Can she then renew the cruise, and return again, and so repeatedly? The voyage, in that way, might last for years. But the true meaning is, “I will excuse a deviation for “six weeks.” Six weeks is a continuation, a congregate denomination of time. If they had meant separate days, they would have said 42 days.”

Witnesses may prove an usage as explanatory of a clause in a policy; but their opinion of its meaning is not admissible evidence.

One reason why it is a condition implied in the contract that the ship shall not deviate, is, that, by departing from the direct course of the voyage, the risk is necessarily prolonged. The ship must therefore proceed on her voyage, not only by the shortest and safest course, but also with all reasonable expedition; and in the following case it was determined, that any unnecessary delay will be equivalent to a deviation.

A ship was insured, "At and from the coast of *Africa* to the *West Indies*, with liberty to exchange goods and "slaves."—It appeared that the ship stayed on the coast from *August* till *March*, and was employed in receiving slaves on board, the produce of the cargoes of other ships, which were afterwards put on board those ships and sent to the *West Indies*; that this is the employment of what is called a *factory-ship*, but a regular factory-ship is thatched and covered, and receives the slaves till a sufficient number be collected to send away; but it does not appear that any slaves, the produce of the ship's own cargo, were sent away in other vessels, though her stay on the coast was several months beyond the usual stay of ships in that trade.—The court decided that this was equivalent to a deviation.—Lord *Mansfield* said,—“The single point here is, whether there has not been what is equivalent to a deviation; whether the risk has not been varied. No matter whether the risk has or has not been thereby increased. If a ship insured for a trading voyage be turned into a floating warehouse, or a factory ship, the risk is different. It varies the stay; for while she is used as a warehouse, no cargo can be bought for her. This is the law. The fact is, that, though this was not a regular thatched factory ship, yet she was used as a thatched factory ship is used. This being clear, it follows that the risk is different in point of length, from that which is generally understood in the trade, and consequently from that which was insured (*a*).”

The ship must perform the voyage within a reasonable time, and any unnecessary delay will amount to a deviation.

A ship insured on a trading voyage on the coast of *Africa*, stays there beyond the usual time, as a receiving ship for slaves; this is equivalent to a deviation.

Hartley v. Buggin, B. R. M. 22. G. III. MS. S. C. Park, 313.

A deviation is not the less fatal because the risk is not increased by it.

(a) Vid. *Parkinson, v. Collier*, sup. 169, in which Lord *Kenyon* lays down the same doctrine.

Distinction between an intended deviation and a different voyage.

A deviation from the voyage insured is generally the result of after-thoughts, after-interest, after-temptation; and not of any previous deliberate intention. For it is not easy to conceive that any man, at all conversant in business, would be so foolish as to intend *before-hand*, to deviate from the voyage described in the policy; because that would be paying for an indemnity, without having it. When the insured intends a deviation from the direct course of the voyage insured, it is always provided for, and the policy adapted to it, unless fraud be intended. In all cases of deviation, the *termini à quo* and *ad quem* are the same. But where the voyage described in the policy is not the voyage intended, and the insured meaning to send the ship on a different voyage, gives the captain his instructions accordingly; this is not the case of an *intended deviation*; for there cannot be a deviation from a voyage which was never in the contemplation of the parties; but the case of a different voyage from that mentioned in the policy (*a*). It has generally been understood, that a deviation merely *intended*, but never begun, will not discharge the insurer (*b*); and two cases are usually cited in support of this doctrine.

Whether a deviation intended but not begun will discharge the insurer.

Foster v. Wilmer,
2 Str. 1249.

The first was an insurance, "From *Carolina* to *Lisbon*, "and at and from thence to *Bristol*."—It appeared that the captain had taken in salt, which he was to deliver at *Falmouth*, before he went to *Bristol*, but the ship was

(*a*) See the opinions of Lord Mansfield, and Mr. Justice Buller, in *Wooldridge v. Boydell*, Doug. 18, sup. 229; and the opinion of Lord Kenyon in *Stott v. Vaughan*, sup. 232. See, however, *Kewley v. Ryan*, 2 H. Bl. 343, sup. 231.—(*b*) *Roccus* (not. 20) says that the voyage is changed as soon as the captain begins, or even *agrees for*, another voyage. "*Si caperit secundum viaggium licet non completum, vel convenerit asportare alius merces in alium locum.*"—*Emerigon* (tom. 2, p. 56) denies this latter opinion, and holds that if the captain give up his new project, and proceed on the voyage insured, the insurers continue liable. *Casaregis*, (disc. 67, n. 24), says, "*Mutari viaggium tunc dicitur, quando primam principalem destinationem magister navis non sequitur utpote quod navis cum onere, et cum primis vecturis, ad locum destinationis amplius non intendit ire, nec eat.*"

taken

taken in the direct road to both places, and before she came to the point where she would have turned off to *Falmouth*.—It was ruled by Lord C. J. *Lee*, that the insurer was liable; for it was but an *intention* to deviate; which was not sufficient to discharge the underwriter.

The other was the case of an insurance, “From *Honduras* to *London*;” and it appeared that there was a consignment of goods to *Amsterdam*. A loss happened before the ship came to the dividing point between the two voyages. This the insurer was held bound to pay for.

These two cases seem to have been decided on the ground that a mere *intention* to deviate does not amount to a deviation: But it is proper to observe, that these are only *nisi prius* decisions, and that in each of the cases, particularly in the last, the voyage originally intended appears to have been different from the voyage insured; and therefore it would seem that in each, as the law now stands, the contract would be held void, upon the ground of fraud, and the voyage being falsely described in the policy (a).

From a certain point in a voyage there are several tracks to the place of destination, with certain advantages and disadvantages belonging to each, and the captain has always been allowed, when he arrived at the dividing point, to elect, according to circumstances, which of these tracks he will pursue. One of these tracks is prescribed to him by the insured, and this is not stated in the policy, nor even disclosed to the underwriters; and the ship, having taken the course prescribed, is captured.—It was determined that, under these circumstances, the insured could not recover for this loss.—Lord *Kenyon*, Mr. Justice *Asburys*, and Mr. Justice *Grose*, founded their opinion on the want of a full disclosure of the particular course the ship was to take, as being a circumstance that might materially have varied the risk; and this, whether it were considered as a concealment, or a defective

Carter v. Roy.
Ex. Off. 2 Str.
1249.

If there be several tracks to the place of destination, of which the captain ought to be at liberty, when he is at the dividing point, to elect one; but the insured prescribe one to him, the insurer is discharged. Whether this ought to be considered as a deviation or a different voyage originally intended.

Middlewood v. Blakes. 7 T. R. 162, sup. 233.

(a) Vid. *Hodgson v. Richardson*, sup. 228; *Murdock v. Potts*, sup. 230; *Wooldridge v. Boydell*, sup. 229; *Stott v. Vaughan*, sup. 232; *Kewley v. Ryan*, sup. 231.

description of the voyage in the policy, avoided the contract *ab initio*. Mr. Justice *Lawrence* founded his opinion on the ground that this was a *deviation*; and that if the ship had been captured before she came to the dividing point, the plaintiff would have been entitled to recover, as the captain's *intention* to deviate did not, before he came to the dividing point, subject the underwriters to any additional risk (a).

Sect. 2.

What are the Cases of Necessity that will justify a Deviation.

If the master act *bonâ fide*, and only aim at performing the voyage in the shortest and safest manner, a departure from the direct course will be no deviation.

A DEVIATION that will discharge the insurer, must be a voluntary departure from the usual course of the voyage insured, and not warranted by any necessity. If a deviation can be justified by necessity, the insurer will still remain liable. One general principle pervades all the cases on this point; namely, that if the captain, in departing from the usual course of the voyage, acts fairly and *bonâ fide*, and according to the best of his judgment, for the benefit of all parties concerned, and has no other view but to conduct the ship and cargo, by the safest and shortest course, to her port of destination; what he does is within the spirit of the contract, and the voyage will still be protected by it. It is no deviation to go out of the way to avoid danger. In all cases, therefore, in order to determine whether a departure from the direct course of the voyage insured amounts to a deviation that will discharge the insurer, it will be proper to attend to the motives, end, and consequences of the act, as the true criterion of judgment (b).

(a) Vid. the opinions of the judges on this case fully stated, sup. 235.—(b) Per Lord Mansfield in *Enderby v. Fletcher*, at N. P. Trin. Vac. 1780. Vid. *Pelly v. Roy. Ex. Assur.* 1 Bur. 347. sup. 181.

The cases of necessity which are most frequently adduced to justify a departure from the direct course of the voyage insured, are stress of weather, want of necessary repair, joining convoy, escaping from or avoiding an enemy, and mutiny of the crew. These we will consider separately.

The causes which justify a deviation.

And *first*, of *stress of weather*.—If a ship be driven by a storm into any port out of the course of the voyage, she is not obliged to return back to the point from whence she was driven, but may make the best of her way to her port of destination; and this shall not be deemed a deviation. For what is occasioned by the act of God shall be imputed to no man as a fault.

Stress of weather.

Thus, where the plaintiff, a merchant in the *West Indies*, wrote to the defendant who was his correspondent in *London*, desiring him to get an insurance effected on the ship *Friendship*, “At and from *St. Kitts* to *London*, “warranted to sail with convoy.”—The defendant neglecting to make this insurance according to the order, and the ship being lost, the plaintiff brought an action on the case against the defendant to recover the loss. — On the trial of the cause it appeared that the ship left the port of *St. Kitts* to take in her cargo, and let go an anchor at *Sandy Point*; but as the wind blew fresh, she drove out, and could not come in again, but was obliged to go to *St. Eustatia*: That she sailed from thence with the convoy, and afterwards foundered at sea: That *St. Eustatia* is in the direct line from *St. Kitts* to *London*; and the convoy from *St. Kitts* always looked into *St. Eustatia*, to take up any ships that might be there: That when the ship was driven to *St. Eustatia*, after making several unsuccessful efforts to get back to *St. Kitts* to finish her loading, she took the rest of her loading at *St. Eustatia*.—The principal question was, whether there had been a deviation (*a*).—The court determined that there was no deviation.—Lord Mansfield said,—“The only question is, whether

A ship, insured from *St. Kitts* to *London*, is driven by a storm out of the port of *St. Kitts* to *St. Eustatia*, and being unable to return, completes her cargo there, and proceeds on her voyage: This deviation will not discharge the insurers.

Delury v. Stoddart, 1 T. R. 22.

(*a*) In this action the defendant has a right to make every objection to the plaintiffs recovering which an underwriter might have made in an action on the policy, had one been regularly effected. Vid. sup. 209.

this

this be the same voyage as that intended to be insured. If a storm drive a ship into any port out of the course of her voyage, and being there, she does the best she can to get to her port of destination, she is not obliged to return back to the point from whence she was driven: Here the ship tried to go back to *St. Kitts*, but could not; and it is a much easier navigation to go directly from *St. Eustatia* to *London*, than to go back to *St. Kitts* first. She lost no time in taking in her cargo at *St. Eustatia*. Every thing should be imputed to the storm, which was in reality done and occasioned by it. It was a question to be left to a jury, whether this was the same voyage or not; and they have determined it.—Mr. Justice *Asbursft* and Mr. Justice *Buller* concurred in this opinion, and laid much stress on the circumstance of the risk being diminished by the ship's remaining at *St. Eustatia*, and completing her cargo there, instead of returning to *St. Kitts*.—Mr. Justice *Willes* differed from the other judges.

Want of necessary repair.

2. The *want of necessary repair* is another excuse for a departure from the direct course of the voyage. If, in the course of the voyage, the ship, from stress of weather, damage received from an enemy, or any other cause, be reduced to such a state that she cannot safely proceed on her voyage, without repairs, the captain will be justified in carrying the ship to some port, the least out of his course, where such repairs can be had; and he must content himself with such repairs as can be most expeditiously done, so as to enable the ship to perform the voyage insured.

A ship, insured from *Fort St. George* to *London*, goes to *Bengal* to refit: This is no deviation, if she could not refit at *Fort St. George*, and *Bengal* was the nearest place.

Motteaux v. Lond. Assur. Co.
Atk. 545.

As where a ship was insured "from *Bengal* to *London*;" "the adventure to commence from her arrival at *Fort St. George*, with liberty to stay at any ports or places without prejudice."—The ship came to *Fort St. George* in *February* 1733 in her way to *England*, but being leaky, and in very bad condition, by the advice of the governor and council, she sailed for *Bengal* to be refitted. After being sheathed, she, in her homeward voyage, was stranded and lost.—There was evidence to prove that *Bengal* was the proper place to refit, and that the ship had her lading taken out, and went thither for that purpose

pose only: That this was a voyage of necessity, and not a trading voyage; for she took nothing on board but provisions and ballast. Lord Chancellor *Hardwicke*, though he admitted that want of necessary repair would justify a ship in going to the nearest place where that could be had; yet, as there was no proof to shew that the ship could not have been equally repaired at *Fort St. George*, he directed an issue to try whether the loss had happened during the voyage insured. The cause was tried at *Guildhall*, and the insured recovered.

So, where an insurance was made on a ship, "At and from *Rochelle* to the coast of *Africa*, during her stay "and trade there, and at and from thence to *St. Domingo*."—Three days after the ship sailed from *Rochelle*, she met with a gale of wind, which strained her seams, and split her mizen yard, and damaged her rigging. The crew, in a body, desired the captain, for the preservation of their lives, to make to some port to repair. The captain, finding that the ship, which was new, had too little ballast, complied, and put into *Lisbon*, the nearest port; from whence, after taking 500 rolls of tobacco, as ballast (a), he proceeded to *Guinea*, and from thence to *St. Domingo*, but the ship was captured in sight of that island.—In an action on the policy, it was insisted, on the part of the defendant, that going to *Lisbon* was a deviation, and witnesses were called to prove that, from the latitude in which the storm happened, she might have proceeded to the coast of *Africa*, and there have repaired at a less expence, and that she could not need additional ballast. But it came out that no additional premium would have been required for liberty to touch at *Lisbon*.—Lord *Mansfield* laid much stress on this circumstance (b), and

*Guibert v. Red-
shaw*, at N. P.
Hil. Vac. 1781.
Park 301.
S. P.

(a) For any thing that appears in the note of this case, the captain went to *Lisbon* only for ballast, nor does it appear that the ship had any sort of repair there. Perhaps the necessity of getting more ballast would have justified going to *Lisbon*; but that is not the ground upon which the case is stated to have been put.—(b) The reason why a deviation discharges the underwriter is, not because the risk is thereby increased, but because

and left it to the jury on the ground of necessity to go to *Lisbon* for repairs.—The plaintiff had a verdict.

Joining convoy.

3. A third cause of justifiable deviation is when the ship is obliged to go out of her direct course in order to join convoy (a).

If a ship go out of her way to join convoy, this is no deviation.

Bond v. Gonfales, at N. P. 2 Sulk. 445.
S. P. *Gordon v. Morley*, sup. 265; and *Campbell v. Bourdieu*, 2 Str. 1265, S. P.
Bond v. Nutt, (sup. 601. sup. 255.

As where the *William* galley was insured, "From Bre-
men to London, warranted to depart with convoy."
—The galley sailed from *Bremen* under convoy of a
Dutch man of war, to the *Elb*, where they were
joined by two other *Dutch* men of war and several
English merchant ships. From thence they sailed to
the *Texel*, where she found a squadron of *English* men of
war. After a stay of nine weeks, they sailed from the
Texel, and the galley, being separated in a storm, was
taken by a *French* privateer, retaken by a *Dutch* priva-
teer, and paid 80 l. salvage.—In an action on the po-
licy to recover this loss, it was ruled by Lord C. J. Holt,
that the voyage ought to be according to usage, and that
their going to the *Elb*, though in fact out of the way,
was no deviation; for, till after the year 1703, there
was no convoy for ships directly from *Bremen* to *London*;
and the plaintiff had a verdict.

Avoiding an enemy.

4. To escape from, or avoid, an enemy, is another cause of excusable deviation, of the same nature as the last (b).

Mutiny of the crew.

5. The last case of this sort which I shall mention is, where the captain, under the compulsion of a mutinous crew, is forced to leave the direct course of his voyage, and put into port.

cause the voyage performed is not the voyage insured. (Vid. sup.) The circumstance of the premium being the same, had liberty to touch at *Lisbon* been given in the policy, ought not, therefore, to have had any other effect than to prove that it was not originally intended to put into *Lisbon*; for if that had been intended, it might have been provided for in the policy, without any additional expence of premium.—(a) Per Lord Mansfield in *Bond v. Nutt*, sup. 257.—(b) *Roccus*, Resp. 30, n. 1, & 31, n. 3. *Casaregis*, dis. 1, n. 68. *Pothier*, h. t. n. 51, *Emerig.* tom. 2, p. 57.

As, where a letter of marque, insured for a voyage from *Bristol* to *Newfoundland*, failed with express orders, that if she should take a prize, she should nevertheless proceed on her voyage; and that some hands should be put on board the prize and sent with it to *Bristol*. A prize was taken in the course of the voyage, and the captain ordered some of the crew to carry it to *Bristol*, while he proceeded on his voyage: But the crew opposed him, and insisted on his going back, though he acquainted them with his orders. He was forced however to submit, and on his return, his own ship was taken.—The underwriters insisted that this was a deviation which discharged them: But Lord Chief Justice *Lee* held that this was excused by the force upon the master, which he could not resist; and therefore fell within the excuse of necessity, which had always been allowed (*a*).

The crew of a letter of marque compel the captain to return home with a prize, instead of proceeding on his voyage according to his orders; this will excuse the deviation.

Elton v. Brogden,
at N. P. 3 Str.
1264. Inf.

From these authorities it is plain that nothing will justify a deviation but a real and imperious necessity, and that the extent of the deviation must be justified by the degree of that necessity.

The extent of the deviation must be justified by the degree of necessity.

It only remains to be observed, that where a ship is compelled by any necessity to deviate from the usual and regular course of the voyage, she must pursue the new voyage of necessity so as to get to her port of destination by the shortest and safest course she can take; and any wilful departure from the direct course of this voyage, or any unnecessary delay, will be a new deviation, which will discharge the underwriters in like manner as if it had been a deviation from the original voyage (*b*).

And the insured must not deviate from the voyage of necessity.

(*a*) Vid. inf. S. C. under the head of barratry.—(*b*) *R. Lavabre v. Wilson*, *Doug.* 271, sup. 186, 399.

C H A P. XIII.

Of Loss.

A LOSS, in insurance, is the injury or damage sustained by the insured in consequence of the happening of one or more of the accidents or misfortunes against which the insurer, in consideration of the premium, has undertaken to indemnify the insured. These accidents or misfortunes, or perils, as they are usually denominated, are all distinctly enumerated in every policy. In our common policies they are set forth in the following words.

Perils usually
insured against.

‘Touching the adventures and perils which we the
‘assurers are content to bear, and do take upon us in this
‘voyage, they are of the seas, men of war, fire, enemies,
‘pirates, rovers, thieves, jettisons, letters of mart and coun-
‘ter mart, surprizals, takings at sea, arrests, restraints, and
‘detainments of all kings, princes, and people, of what
‘nation, condition, or quality soever, barratry of the
‘master and mariners, and of all other perils, losses, and
‘misfortunes, that have or shall come to the hurt, detri-
‘ment or damage of the said goods and merchandizes,
‘and ship, &c. or any part thereof.’

Total loss.

Every loss is either total or partial. The term *total loss* is understood in two different senses; natural and legal. In its natural sense, it signifies the absolute destruction of the thing insured. In its legal sense, it means not only the total destruction, but likewise such damage, to the thing insured, though it may specifically remain, as renders it of little or no value to the owner. So a loss is said to be total, if, in consequence of the misfortune that has happened, the voyage be lost, or not worth pur-
suing,

fuings, and the projected adventure frustrated; or if the value of what is saved be less than the freight, &c.

A *partial loss* is any loss or damage short of, or not amounting to, a total loss; for if it be not the latter, it must be the former.—Thus, if a ship, insured for a given voyage, arrive at her port of destination, and there remain 24 hours moored in safety; or, if she be insured for a *term*, and she survive the term; no injury which she could have sustained during the voyage, in the one case, or during the term, in the other, however great, can amount to a total loss (*a*). So, in the case of an insurance on goods; the insurer contracts that they shall arrive safe at the port of delivery; or if not, that he will indemnify the insured. If they specifically remain and are actually landed at the port of delivery, however damaged in the voyage, the injury will amount but to a partial loss (*b*).

Partial loss.

To ship.

To goods.

Partial losses are sometimes denominated *average losses*, because they are often of the nature of those losses which are the subject of average contributions; and they are distinguished into general and particular averages (*c*).

Average loss.

Having premised thus much of the nature and different kinds of losses, we will now proceed to consider this branch of our subject under the following heads:

1. Loss by the perils of the sea;
2. Loss by running foul of another vessel;
3. Loss by fire;
4. Loss by capture;
5. Loss by arrest and detention of princes;
6. Loss by barratry;
7. Loss by average contributions;
8. Loss by expence of salvage;
9. Of wilful and fraudulent losses.

(*a*) Vid. *Cazalet v. St. Barbe*, *Furneau v. Bradley*, *Fitzgerald v. Poole*, inf. c. 14, § 2.—(*b*) Vid. *Cocking v. Frazer*, sup. 144.—(*c*) Vid. inf. § 7.

Sect. 1.

Of Loss by the Perils of the Sea.

What is meant
by perils of the
sea.

IN a large sense, all the accidents or misfortunes to which those engaged in maritime adventures are exposed, may be called perils of the sea (a). But it has been found convenient to distinguish the losses to which ships and goods at sea are liable, by the *immediate causes* to which they may be particularly ascribed. In this view, losses *by the perils of the sea* are understood to mean only such accidents or misfortunes as proceed from mere *sea-damage*, that is, such as arise from stresses of weather, winds, and waves, from lightning and tempests, from rocks and sands, &c.

Foundering.

Stranding.

A loss by the perils of the sea may therefore happen, *first*, by the ship's foundering at sea, and then it must, in most cases, be total in the strictest sense of the word: *Secondly*, by stranding, which is either *accidental*, as where the ship is driven on shore by the winds and waves; or *voluntary*, as where she is intentionally run on shore, either to preserve her from a worse fate, or for some fraudulent purpose. A stranding may be followed by shipwreck, in which case it becomes a total loss; or the ship may be got off in a condition to prosecute her voyage, and then the damage sustained and the expences incurred will be only a partial loss of the nature of a general average:—*Thirdly*, by the ship's striking against a sunken rock, or any other thing under water, which may occasion the springing of a leak, or absolute shipwreck.

Striking against
a sunken rock,
&c.

If a ship be not
heard of within
a reasonable
time, she shall
be presumed to
have foundered
at sea.

It often happens that ships founder at sea, and all on board perish, and this out of the view of any person who could convey any information of the misfortune to the owners. In such case, therefore, there can be no positive proof of the cause of the loss. But where no intelligence has been received of a ship within a reasonable time after she has

(a) Vid. 2 *Rel. Ab.* 248, pl. 10; *Comb.* 56; 1 *Show.* 322, 3.
failed,

failed, it may reasonably be presumed that she foundered at sea; because every other loss would probably, sooner or later, have been heard of.

As, where a ship was insured in 1739, "from *North Carolina to London*, with a warranty against captures "and seizures."—Four years after the ship failed, an action was brought on the policy, and in the declaration the loss was alleged to have happened by *sinking at sea*, and the evidence was, that she failed on her intended voyage, and had never afterwards been heard of.—It was insisted, for the defendant, that, as captures and seizures were excepted, it lay upon the plaintiff to prove that the loss happened in the particular manner declared on.—But Lord C. J. *Lee* said, that it would be unreasonable to expect certain evidence of such a loss, where every person on board is presumed to have perished: And all that can be required is, the best proof the nature of the case admits of. He therefore left it to the jury, who found for the plaintiff.

So, where a ship was insured, "Against any loss happening before the 30th of *November 1762*, free from "average."—The ship failed from *Newcastle for Copenhagen* (a), which is usually about ten days voyage; but was taken by a *French* privateer, and ransomed; and then proceeded on her voyage to *Copenhagen* in a bad condition. She never was heard of afterwards, though all due diligence was used to obtain intelligence of her, and several ships that failed after she did, arrived safe at *Copenhagen*.—Lord *Mansfield* told the jury that this evidence was a sufficient ground to presume that the ship perished at sea, unless the contrary appeared. The jury accordingly found for the plaintiff.

In *France* and *Spain* positive regulations have been made, to ascertain the time when the insured may call on the underwriters for the loss, on the presumption that a mis-

A ship not being heard of in four years after she failed, the insured may sue the underwriters as for a loss by *sinking at sea*.

Green v. Brown, at N. P. 2 Str. 1199.

A ship sails from *Newcastle for Copenhagen*, and is never after heard of, and several others that failed after she did, arrived safe: This is sufficient evidence that she perished at sea.

Newby v. Read at N. P. Mich. Vac. 3 S. III. Park 63.

In some countries there is a limitation of time for this presumption,

(a) It is strange that in the note of this case there is no mention of the time of the ship's sailing, nor does it appear how long after she failed the plaintiff brought his action.

ving ship has perished at sea. In *Spain*, if a ship has not been heard of for a year and a half from her departure on a voyage to or from the *Indies*, she is deemed lost. In *France*, after a year from a ship's sailing on *common voyages*, and two years on *distant voyages*, the insured may abandon and demand payment without other proof of loss (a),

In *England* there is no such limitation.

With us there is no time fixed by law when a missing ship shall be presumed to have foundered at sea. Every case must depend on its own circumstances; and it would be difficult to frame any certain uniform regulation for this purpose, that might not be productive of more inconvenience than advantage. Persons well acquainted with maritime affairs may form a pretty correct judgment when a ship, in any case, may be reasonably despaired of. When that time arrives, a liberal underwriter will pay his loss; and if any doubt remain, he may either demand security from the insured to refund the money, in case the ship should afterwards arrive safe, or he may trust to his remedy by action, to recover it back (b).

If a ship be driven by stress of weather on an enemy's coast, and there captured; this is a loss by capture, not by the perils of the sea.

Every loss must be imputed to its immediate, and not to any remote cause. Therefore, if a ship be driven by stress of weather on an enemy's coast, but not materially damaged, and she be there captured; this is not a loss by the perils of the sea, but by *capture*; and for this the insured may recover upon a policy against capture only (c). And yet it has been holden that capture is a loss by the perils of the sea, as much as if it were occasioned by shipwreck or tempest (d).

If slaves be thrown overboard, on account of a scarcity of water, occasioned by the captain's mistaking his course; this is not a loss by the perils of the sea.

If the master of a slave ship mistake his course, whereby a scarcity of water ensues, and a number of slaves are thrown overboard to save the rest; it will not be sufficient for the insured, in declaring for this loss, to state that, by contrary winds and currents, and *the perils of*

(a) Vid. 2 *Mag.* 33. 177, Ord. of *Louis XIV*, h. t. art. 58. (b) Vid. *Tonkins v. Bernet*, 1 *Salk.* 22.—(c) Per Lord *Kenyon*, at *N. P. Green v. Elmstie*, *Peake* 212. inf. c. 17, § 5.—(d) 2 *Roll. Ab.* 248, pl. 10, *Comb.* 56. 1 *Shaw.* 322, 3.

the sea, the ship was retarded, and the slaves perished for want of water (a).

So, where a number of slaves perished for want of sufficient and proper food, and this failure was occasioned by extraordinary delay in the voyage, arising from bad and stormy weather; this was holden to be a loss by natural death, and not by the perils of the sea (b).

So, if the slaves die for want of food, occasioned by the extraordinary length of the voyage.

So, where a ship was insured from *St. Bartholemew* to the coast of *Africa*, and during her stay and trade there, and back to *St. Bartholemew*.—In an action upon this policy for a total loss by the perils of the sea, it was attempted to recover as for a total loss, upon evidence that she was destroyed by the worms, which are well known to infest the rivers in hot climates. A merchant swore that he had known many instances of loss by this species of injury, but that the underwriters had uniformly refused to pay.—Lord *Kenyon*, who tried the cause, decided, upon this evidence, that this was not a loss by the perils of the sea; and the jury unanimously concurred with his lordship, and found a verdict for the defendant.

If a ship be destroyed by worms, this is not a loss by the perils of the sea.

Rbol v. Parr,
Esp. 444. Inf.

(a) It were impossible to pass over the mention of this case, without some mark of reprobation. False reasoning has never been carried to the length of maintaining that human beings, however degraded their condition, could be justifiably thrown overboard, like so many bales of goods, to lighten a ship in a storm. Every thing on board, however precious, should be thrown into the sea sooner than the meanest slave. Some have supposed that if, in a case of extreme necessity, a part of the crew might be sacrificed to save the rest, the fate of the victims should be determined by lot equally amongst all. But *Puffendorff*, with sounder reasoning, maintains, that whoever, under pretence of saving the ship, should throw men into the sea, whether freemen or slaves, and whether by lot or without lot, is guilty of homicide; for no man, in order to save his own life, has a right to take away the life of any other human being, who does not attack him. Vid. *Puffend.* lib. 2. c. 6. § 3. ff. de reg. jur. 32. *Cic. off.* l. 3. c. 23.—(b) *Rbol v. Parr*, 6 T. R. 656, inf. c. 15. § 1.

The insurer is not answerable for any damage to the ship occasioned by the ordinary services she is engaged in.

The insurer is not answerable for any diminution in the value of the ship, her rigging or furniture, if this be occasioned by the ordinary service she is engaged in. As if a cable break by the friction of the rocks, and an anchor be lost, the insurers are not answerable. But if by some extraordinary accident, as the violence of the winds or waves, it become necessary to slip a cable, or a cable be broke, and an anchor lost, or a sail or yard be carried away, this is a loss by the perils of the sea within the policy (a).

For what loss of animals the insurer is liable.

If animals be insured, their death, occasioned by tempests, by the shot of an enemy, by jettison in a storm, or by any other extraordinary accident, is a loss within the policy. Not so, if it be occasioned by disease (b).—*Valin*, and after him *Pothier*, class animals and negro slaves under the same head, and apply the same rules to both (c).

Sect. 2.

Of Loss by Running Foul.

A SPECIES of damage to which ships at sea are often exposed, is that occasioned by one ship running foul of another. This may be the effect of mere accident, without blame being imputable to the master of either ship; or it may be occasioned by the negligence or misconduct of one or both of them. The injury occasioned by this accident is a loss within the policy (d), unless it be imputable to the misconduct of the master or mariners of the ship insured; in which case the insurer is not liable,

(a) *Valin* sur art. 29, p. 76, *Pothier*, h. t. n. 66. *Emerig.* tom. I., p. 393.—(b) *Emerig.* ib.—(c) *Vid. Valin* sur art. 11, and 15. *Pothier*, h. t. n. 66.—(d) *Vid. Ord. de Louis XIV.*, tit. *avaries*, art. 11, and tit. *assurance*, art. 26.

according

according to the opinion of *Emerigon* (a). But in such case, the misconduct of the master or mariners would, I conceive, amount to barratry; and as that is a risk always mentioned in our policies, the insurer would be liable for the loss. An action, however, would lie against the master of either ship, to whom negligence or misconduct is imputable, for the loss he has occasioned.

Sect. 3.

Of Loss by Fire.

There can be no doubt but that a loss occasioned by fire which is merely accidental, and not imputable to any fault of the master or mariners, is a loss within the policy; and in many places the insurer is held to be liable, even where the fire happens by the fault of the master or mariners (b). But in *France* the insurer is not held answerable in such case, unless, by the policy, he be liable for barratry (c).

Emerigon mentions two cases on this subject.—In the one, a *Dutch* vessel was refused admittance into the port of *Majorca*, and was burnt by the *Spaniards*, from an apprehension that she had the plague on board: There the insurer was holden to be liable, no blame being imputable to the master or mariners.—In the other, a ship, with the plague on board, of which several persons had died, was carried into the port of *Marseilles*, the master pretending that the deaths were occasioned by *unwholesome food*. The infection was communicated to the town and neighbouring country. The ship was burnt.—Here it was determined that the insurer was not liable, upon the ground that the loss was occasioned by the misconduct

Whether a loss by fire imputable to the fault of the master or mariners, be a loss within the policy.

If a ship be burnt by order of the State where she happens to be, to prevent infection; this is a loss within the policy.

(a) Vid. *Emerig.* tom. 1, p. 413.—(b) *Straccha*, gl. 18, *Targa*, ch. 65. *Emerig.* tom. 1, p. 434.—(c) *Pothier*, h. t. n. 53. *Emerig.* ib.

of the master (*a*).—In this case barratry could not have been one of the perils inserted in the policy.

If a ship be attacked by an enemy, and the master find it impossible to defend her, he may leave her and set her on fire, to prevent her falling into the enemy's hands, provided he can preserve the lives of the crew. In such case, the insurer is liable for the loss; for the master was justified in burning the ship under such circumstances (*b*).

Sect. 4.

Of Loss by Capture.

What shall be deemed a capture.

CAPTURE is when a ship is subdued and taken by an enemy in open war, or by way of reprisals, or by a pirate, and with intent to deprive the owner of it.—Capture may be with intent to possess both ship and cargo, or only to seize the goods of the enemy, or contraband goods, which are on board.—The former is a capture of the ship in the proper sense of the word; the latter is only an arrest and detention, without any design to dispossess the owner.—Capture is deemed *lawful*, when made by a declared enemy, according to the laws of war; and *unlawful*, when it is against the rules established by the law of nations.

Every capture, whether lawful or unlawful, is a loss within the policy.

But for every loss occasioned by capture, whether lawful or unlawful, and whether by friends or enemies, the insurer is liable (*c*), the words of the policy being sufficiently comprehensive to include every species of capture to which ships at sea can ever be exposed.

And the insurers are answerable, to the extent of the sum insured, for the loss actually sustained.

And in every case of capture the insurer is answerable, to the extent of the sum insured, for the loss actually sustained. This may be either *total*, as where the ship or

(*a*) *Emerig.* ut sup.—(*b*) *Pothier*, h. t. n. 53. *Valin*, art. 26. h. t.—(*c*) *Le Guidon*, ch. 7. n. 1. *Casaregis*, disc. 1, n. 118. *Roccus*, n. 41, 54, 55, 64, 66. *Valin*, art. 26, h. t. *Pothier*, h. t. n. 54.

goods insured are not recovered again; or *partial*, as where the ship is recaptured or restored before abandonment; in which case the insurer is bound to pay the salvage, and any other necessary expence the insured may have been put to for the recovery of his property.

And the insurer is liable for a loss by capture, whether the property in the thing insured be changed by the capture or not. For a ship is lost by capture, though she be never condemned, or even carried into any port or fleet of the enemy. It can never, therefore, be a question between the insurer and the insured, whether the capture be lawful or not, or whether the property be changed by condemnation, or by being carried into an enemy's port. A capture by a pirate, or under a commission, when there is no war, does not change the property; and yet, as between the insurer and the insured, it is just upon the same footing as a capture by an enemy in open and declared hostilities: For whatever rule ought to be observed in questions of this sort, as between the owner and the *recaptor* or his *vendee*, it can in no way affect the case, as between the *insured* and the *insurer*.

And they are liable, whether the property be changed or not by the capture.

Therefore, as to the length of possession by an enemy, which is deemed sufficient to divest the property out of the original owner, or the effect of a re-capture in re-vesting it,—these are now matters which can never come directly in question between insurer and insured. They never could have come in question, in any case of insurance upon *real interest*; because, according to the above principles, they never could have varied the case. They could only have had their origin in gaming insurances, in which there could be no average or benefit of salvage, and in which, therefore, it was always necessary to set up a total loss, for the purpose of the wager. In gaming insurances, when there was a re-capture, the claim, as for a total loss, seems formerly to have involved the question, whether the property in the thing insured had, by the capture, or any proceeding founded on it,

Therefore the effect of capture and recapture, in divesting or re-vesting the property, can make no question, except in insurances without interest.

been divested out of the original owner, or not, before the re-capture.

And yet where a ship is insured "interest or no interest," a capture, however illegal, and though the ship be retaken, is a total loss.

And yet, the four following cases will shew that, upon insurances 'interest or no interest,' it has been repeatedly determined that if the ship be taken, it is a total loss, however illegal the capture may be, and though the ship be retaken and restored to the owner.

It is observable, however, that the policies in the first, second, and fourth of these cases, though they contained the words "interest or no interest," were evidently insurances upon real interest.—Lord *Mansfield*, indeed, in his observations on the first of them (*a*), says, 'that it was the case of a *wager policy*; and the ship having been once in fact taken, the event had happened against which the insurance was made, though she was afterwards recovered.'—But his lordship must have been misled by the words, "interest or no interest,"—to suppose this to be a *wager policy*; for it is plain, from the judgment, that the court considered the plaintiff as interested in the ship.

A ship insured, interest or no interest, being captured, this is a total loss, though the capture was illegal, and the ship recaptured.

De Paiba v. Ludlow, 1 Com. 361.

As where a ship, insured "interest or no interest," was taken by a *Swedish* pirate, and, after continuing in his possession for nine days, was re-taken by an *English* man of war, and carried into *Harwich*, but not till after an action was brought on the policy:—The court held that though the ship was retaken, yet the plaintiff received a damage, for his voyage was interrupted: That the question was not, whether the plaintiff should have his ship again, and should not lose his property, but what damage he had sustained.

A privateer insured for a three months cruise, "interest or no interest," is taken and detained for three days, and then retaken, yet it is a total loss.

Pand v. King, 1 W. Jf. 191.

So, where a privateer was insured "for three months, interest or no interest, free from average, and without benefit of salvage."—The ship was taken by a *French* ship of war, within the three months; her guns and 117 of her men taken out of her, and carried into *France*. But after she

(a) Vid. Lord *Mansfield's* observation on *De Paiba v. Ludlow*, 2 Bur. 695.

had

had remained in possession of the enemy for three whole days, and before she was carried into any port of the enemy, she was retaken by an *English* privateer, and carried into *Lisbon*, before the expiration of the three months; so that, by the capture, she was prevented from finishing her cruise. It appeared that the insured was interested to more than the amount of the sum insured; and that the master of the privateer had obtained a decree in the court of admiralty of *Gibraltar* that the ship should be restored to the owners, on payment of one third part for salvage.—The court determined that, though the ship was never carried *infra prasidia hostium*, this was not an average, but a total loss to the insured.—Lord C. J. *Lee*, in delivering the opinion of the court said;—"Although by the civil law it may not, perhaps, be adjudged a total loss, yet the rules of that law are not to govern us, but we must give our judgment according to the common law of *England*, upon this agreement between the parties, whose intention appears and must guide us. By the civil law, there must be a total loss, to entitle the insured to recover; but the policy, in this case, extends to captures and other accidents.—The meaning of the parties here is plain: The insured paid his premium in consideration of the insurer's undertaking that the ship should cruise safely for three months; the jury have found that she was disabled from prosecuting her cruise for three months. The insurance is to be understood for the cruise of three months, and in common sense it cannot be otherwise; so that, as soon as the voyage is broken or interrupted, the cruise is at an end. Safety during the three months is what is meant; but it appears that the ship was taken and detained within that time, and that the plaintiff was hindered in his cruise; and this, by our law is a total loss to the plaintiff. I have avoided saying any thing on the question, whether this was a prize or not, as having never been carried *infra prasidia hostium*, because we are all of opinion that this is a total loss."

So, where the insurance was, "on goods, interest or no interest, at and from *Jamaica* to *Bristol*."—The ship in her

Goods are insured "interest or no interest."
The ship is taken

and carried into
the enemy's
port; and after
eight days cut
out, and restored
to the owner, on
payment of sal-
vage; yet the
insured shall re-
cover as for a
total loss.

Dean v. Dicker;
at N. P. 2 Str.
1250.

her passage was taken by a *Spanish* privateer, and carried into a port in *Spain*, kept there eight days, and then cut out by an *English* ship.—The plaintiff insisted that this insurance, though on goods, was to be considered as a wager on the bottom of the ship, and therefore, he was intitled to recover as for a total loss.—The defendant said, that, by the stat. 13 G. II. c. 4. the ship and cargo were to be restored to the owners upon paying salvage (a); and that this was only an average loss, and the plaintiff could only recover in the case of a total loss.—Lord C. J. *Lee* held, that the plaintiff was entitled to recover: For this was a wager upon a total loss, and here had happened one, by the ship's being carried into port, and there detained eight days: That where the policy is, "*interest or no interest*," the provisions of the act, in cases of valued policies, could not take place: That the act does not declare that the property is not gone by such a capture, but only provides for restoring the ship to the former owner: But, that it might be otherwise, where the ship was re-captured before she was carried *infra praesidia*; or in case of goods actually on board, and upon a valued policy.

A captured ship is
insured *interest*
or *no interest*,
retaken after 12
days, and sold
by the owner to
pay the salvage;
yet this is a total
loss.

Whitehead v.
Bance, at N. P.
B. R. Mich.
1749. *Park* 77.

The effect of a
capture and re-
capture in di-
vesting or re-
vesting property.

So, where an insurance was made on a ship "*interest or no interest, free of average, &c. from Jamaica to Hull*."—In her voyage she was taken by a *French* privateer, and carried into *Hamburg*; and after being twelve days in the hands of the enemy, was retaken by an *English* ship, and brought to *London*, where she was adjudged to be restored to the owner, paying salvage. The owner sold the ship and paid the salvage.—In an action on the policy, this was holden to be a loss of the voyage (b); and a verdict was given accordingly.

But though no question can now arise, between the insured and the insurer, as to the effect of a capture or recapture in divesting or re-vesting the property; yet, as it may sometimes be of importance, in matters of insurance to know how the law stands on the subject, it may not be improper, in this place, to enquire shortly,

- (a) Vid. inf. § 7, how salvage is at present regulated.—
(b) By the *loss of the voyage* is here to be understood a *total loss*.
when

when a capture shall be deemed to transfer the property to an enemy, and what shall be the effect of a re-capture in revesting it in the original owner.

Voet on the pandects, and several authors he refers to, maintain with great earnestness, *per solam occupationem, dominium prædæ hostibus acquiri.* (a). But the general opinion seems to be, that by the law of nations, the property of things captured in war is changed when all reasonable hope of recovering them is gone; and, with respect to things moveable, all reasonable hope of recovering them is presumed to be gone when they are brought within the protection of the enemy's fortrefs (b).

But what custody of ships or effects taken at sea, shall be equivalent to a placing of things captured on land *infra præsidia*, is a subject of much doubt and dispute. *Grotius* says, that ships or goods taken at sea become the property of the captors, when they are brought into the enemy's harbours, or to the place where his whole fleet is stationed; for then all hopes of recovering them may be said to vanish. But, he adds, that by the law of nations as introduced among *European* states in more modern times, things are considered as captured when they have been 24 hours in the power of the enemy (c).

Opinions of different authors on this subject.

Bynkershoek, and several writers whom he follows, absolutely deny this pretended rule of the law of nations,

(a) *Voet*, lib. 49, tit. 15, vol. 2, p. 1155.—(b) *Cæterum in hac belli quæstione, placuit gentibus, ut cepisse rem is intelligatur qui ita detinet ut recuperandi spem probabilem alter amiserit, aut ut res persecutionem effugerit. Hoc autem in rebus mobilibus ita procedit, ut capta dicantur ubi intra fines, id est præsidia hostium, perducta fuerint. Grot. de jur. bel. ac pac. lib. 3. c. 6. § 3. Vid. March Rep. 110.—(c) Cui consequens esse videtur, ut in mari navis et res aliæ captæ censeantur tum demum cum in navalia aut portus, aut ad eum locum ubi tota classis se tenet, perductæ sunt.—Nam tunc desperari incipit recuperatio. Sed recentiori jure gentium inter *Europæos* populos introductum videmus, ut talia capta censeatur ubi per horas viginti quatuor in potestate hostium fuerint. Grot. ubi sup.—Vid. *Consolato del Mare*, c. 283, 287. *Roccus*, not. 66.*

and

and insist on the rule of the *Roman* law, that the prize must be carried *infra præfidia* before it can become the property of the captor; and by *præfidia* he understands the *camps*, the *ports*, the *towns*, and the *fleets*, of the enemy (*a*).

Other writers have drawn other lines, by arbitrary distinctions, partly from policy, to prevent too easy a disposition to neutrals, and partly from equity, to extend the *jus postliminii*, or the right of reclaiming what has been recovered from the enemy, in favour of the original owner. No wonder, therefore, that there is so much uncertainty, and such a variety of notions among them about fixing a positive boundary by the mere force of reason, where the subject matter is arbitrary, and not the subject of reason alone (*b*).

How considered
by the law of
England.

In our courts of admiralty it has always been holden that, by the marine law of *England*, independent of the statute which commands restitution, and fixes the rate of salvage, the property is not changed in favour of a vendee or recaptor, so as to bar the original owner, till there has been a regular sentence of condemnation: And in the reign of King *Charles* the Second, a solemn judgment was given upon this point; and restitution of a ship taken by a privateer was decreed, after she had been fourteen weeks in the enemy's possession, *because she had not been condemned* (*c*). The same doctrine has, in several instances prevailed in our courts of common law (*d*). In one case it was holden that nine days possession by the captor, and in another, that four years possession, and several voyages performed, will not change the property, without a sentence of condemnation (*e*).

(*a*) Vid. *Dynk. jur. pub. lib. 1, c. 4.*—(*b*) Vid. Lord *Mansfield's* judgment in *Goss v. Withers*, 2 *Bur.* 695.—(*c*) Cited by Lord *Mansfield* as a case reported to him by Sir *Geo. Lee*. Vid. *Goss v. Withers*, 2 *Bur.* 695.—(*d*) *Assiveo v. Cambridge* 10 *Mod.* 79.—(*e*) — *v. Sands*, 10 *Mod.* 79. See Lord *Mansfield's* observations on these cases, 2 *Bur.* 695. The cases themselves are so defectively reported, that I have not thought them worthy of a more particular notice.

In general, whenever a ship is taken by the enemy, the insured may abandon, and demand as for a total loss; and he is not bound to make any claim or appeal in the enemy's courts of admiralty, or to litigate there the validity of the capture (*a*).

In every case of capture the insured may abandon.

But the insured is in no case bound to abandon; and, as the law now stands, no capture by the enemy can be so total a loss as to leave no possibility of recovery, for the *jus postliminii* continues for ever, except in the case of a captured ship converted into a ship of war (*b*). If the owner himself should retake his ship or goods, he will be fully entitled to them; and if they be retaken at any time, whether before or after condemnation, he will be intitled to restitution, upon payment of a settled salvage (*c*).—In what cases the insured may abandon and demand as for a total loss though the ship be recaptured and restored, or otherwise recovered by the insured, will be found fully explained in the second section of the ensuing chapter on abandonment.

But he is not bound to abandon.

The chance of the owner's recovering his property, does not, however, suspend the demand of the insured, as for a total loss: But in the case of a recapture, justice is done to the insurer by putting him in the place of the insured. In questions upon policies of insurance, the nature of the contract as an *indemnity*, and nothing else, is always liberally considered (*d*).

If he do abandon, the insurer, in case of recapture, will stand in his place.

When there has been a capture, whether legal or not, and the ship has been recaptured or restored, the insurer is bound to defray all necessary expences which the insured has been put to for the recovery of his property. He is therefore liable for a sum of money paid by the insured to the captors, as a *compromise* made *bonâ fide*, to prevent the ship from being condemned as prize.

The insurer is liable for all fair charges occasioned by the capture.

(*a*) 2 Bur. 696. Adm. in *Tyson v. Gurney*, 3 T. R. 479. Vid. post. ch. 14, § 1.—(*b*) Vid. Stat. 33 G. III., c. 66, § 42.—(*c*) Vid. Stat. 29 G. II, c. 34, § 24, and 33 G. III: c. 66, § 42. Inf. ch. 14, § 1.—(*d*) Vid. Lord Mansfield's judgment in *Goff v. Withers*, 2 Bur. 696, 7.

Thus:

A ship warranted neutral is captured as an enemy's ship; and the owners, after an interlocutory decree against them, agree to a compromise: This being done *bond fide*, the insurer is liable for the sum paid by the insured under such compromise.

Berens v. Rucker,
at N. P. 1 Bl.
313.

Thus:—The *Dutch* ship *Tyd* and her cargo were insured “At and from *St. Eustatia* to *Amsterdam*, warranted *Dutch* property, and not laden in any *French* port in the *West Indies*.”—In *May* 1758 the ship took in a cargo of sugars, indigo, and other *French* commodities, partly out of barks, partly from the shore. On the 18th of *June* she sailed on her voyage, and on the 27th was taken by an *English* privateer, and carried into *Portsmouth*. Proceedings in the court of admiralty were begun in *August*, and after many delays and citations from court to court, an interlocutory order was pronounced, in *February* 1759, for the contumacy of the claimants in not specifying what part of the cargo was taken from the shore, what from barks; and it was decreed that the goods should be presumed *French* property. There was an appeal to the lords commissioners of prizes, but as many causes stood before it, the market very high, and the cargo in part perishable, the agent of the owners agreed with the captors to give them 800*l.* and costs to obtain the reversal of the sentence. This was obtained by consent, and it was decreed that there was a sufficient cause of seizure, in order to give costs to the captors, and restitution was decreed to the owners. After the ship's arrival at *Amsterdam*, the chamber of insurances there settled the average of the loss and expences occasioned by the capture, detention and litigation; and for this the action was brought.—Lord *Mansfield* said;—“The first question is, whether this was a just capture (*a*). Both sentences are out of the case, being done and undone by consent. The capture was unjust. The pretence was, that part of this cargo was put on board off *St. Eustatia*, out of barks supposed to come from the *French* islands, and not loaded immediately from the shore. It is now a settled point, that it is the same thing as if they had been landed on the *Dutch* shore, and put on board afterwards, in which case there is no colour for seizure. The

If the produce of an enemy's country be brought from thence in barks and put on board a neutral ship; this will be the same as if the goods had been shipped from the shore in a neutral port. But a neutral ship,

(*a*) This became a question, on account of the warranty that the ship and cargo were *Dutch* property; for if the capture had been just, it would have falsified the warranty.

rule

rule is, that if a neutral ship trade to a *French* colony, with all the privileges of a *French* ship, and is thus adopted and naturalized, it must be looked upon as a *French* ship, and is liable to be taken. Not so, if she have only *French* produce on board, without taking it in at a *French* port; for it may be purchased of neutrals.—The second question is, whether the owners have acted *bonâ fide* and uprightly, as men acting *for themselves*, and upon a reasonable footing; so as to make the expences of this compromise a loss to be borne by the insurers. The judge of the admiralty's order to specify was illegal; contrary to the marine law, and to the act of parliament which is declaratory of the marine law: Because, if they had specified, it would be of no consequence, according to the rule before-mentioned. Yet the captors were in possession of a sentence, though an unjust one. And a court of appeal cannot, or seldom does, give costs or damages which have accrued subsequent to the original sentence; for those damages arise from the fault of the judge, not of the parties. Under all these circumstances, therefore, the owners did wisely to offer a compromise. The cargo was worth 12,000 l.; the appeal was hazardous; the delay certain. The *Dutch* deputy in *England* negotiated the compromise. The chamber of commerce at *Amsterdam* ratified it, and thought it reasonable. Had the whole sentence been reversed, the costs must have fallen heavy on the owners. I therefore think the insurers liable to answer this average loss, which was submitted to, to avoid a total one." The jury found for the plaintiff.

trading to an enemy's colony, with all the advantages of an enemy's ship, is liable to capture.

Formerly it was a common practice to ransom *British* ships, when captured by an enemy, by delivering to the enemy what was called a ransom bill, which secured to the captor the price agreed upon, and operated as a bill of sale of the ship and cargo to the original owners, and as a protection to the ship against other cruizers of the enemy during the remainder of her voyage. A hostage was delivered to the captor to secure to him the punctual payment of the stipulated sum.

Of ransoming captured ships.

This

Actions at common law were formerly maintained on ransom bills.

This ransom bill, independent of the hostage, was considered as a contract of the law of nations, and obligatory upon the owners as well as upon the captain and hostage who signed it (*a*); and actions have been often brought upon them in our courts of common law. And where the ship or goods were insured, the amount of the ransom was usually taken to be the measure of the demand of the insured upon the underwriters in respect of the capture (*b*).

But it was at length determined that an alien enemy could not sue for any right acquired by actual war.

Anthon v. Fisher,
Doug. 648, 9.

In the case of *Anthon v. Fisher*, which was an action on a ransom bill, and came before the court of King's Bench in *Trinity* Term 1782, it was contended on the part of the defendant, that as questions on ransom bills arise out of *matter of prize*, and are to be decided therefore by the *jus belli*, such questions are not triable in any court of common law, but belong exclusively to the courts of prize. The judges of the court of King's Bench differed in opinion upon this question, there was judgment for the plaintiff in that court *pro forma*, and the cause being removed by writ of error to the *Exchequer Chamber*, it was there unanimously determined, that an alien enemy cannot, by the municipal law of this country, sue for the recovery of a right claimed to be acquired by him in actual war, and the judgment of the Court of King's Bench was reversed.

And now, by stat. 22 G. III. c. 35, it is declared unlawful to ransom any *British* ship taken by the enemy.

But this practice of ransoming ships captured by the enemy being found to operate more to the disadvantage than for the benefit of this country, it was at length thought proper to prohibit it altogether. And therefore by stat. 22 G. III. c. 25. § 1. it is enacted, 'That it shall not be lawful for any of his Majesty's subjects to ransom, or to enter into any contract or agreement for ransoming any ship or vessel belonging to any of

(*a*) Si quid singuli hosti promiserint, est in eo fides servanda. *Cic. Vid. Burlamaqui*, part 4, ch. 4. *Vattel*, liv. 3, ch. 16, § 233. *Grot. lib. 3, ch. 21, § 1.*—(*b*) *Vid. Ricord v. Battenham*, 3 *Bur.* 1734, 1 *Bl.* 563. *Cornu. v. Blackburne*, Doug. 619.

‘his Majesty’s subjects, or any merchandizes or goods
 ‘on board the same, which shall be captured by the sub-
 ‘jects of any state at war with his Majesty, or by any
 ‘person committing hostilities against his Majesty’s sub-
 ‘jects.’ By § 2. ‘All contracts and agreements which
 ‘shall be entered into, and all bills, notes, and other se-
 ‘curities, which shall be given by any person or persons
 ‘for ransom of any such ship or vessel, or of any mer-
 ‘chandize or goods on board the same, shall be abso-
 ‘lutely void in law, and of no effect whatever.’ And,
 by § 3, a penalty of 500 l. is given to the informer, for
 every offence against the act. This statute has put an
 end to all questions on the law of ransoms.

It often happens that a recaptured ship is in a state to
 prosecute her original voyage; and, in that case, it is the
 interest of the recaptors, as well as of the other parties
 concerned, that she should be permitted to do so. The
 last prize act (a) has therefore very properly provided,
 ‘That if a ship be retaken before she has been carried
 ‘into an enemy’s port, it shall be lawful for her, if the
 ‘recaptors consent thereto, to prosecute her voyage; and
 ‘it shall not be necessary for the recaptors to proceed to
 ‘adjudication till six months after the recapture, or till
 ‘the return of the ship to the port from whence she
 ‘sailed; and the master, owners, or agents, with the
 ‘consent of the recaptors, may dispose of their cargoes
 ‘before adjudication: And in case the vessel shall not re-
 ‘turn to the port from whence she sailed, or the recaptors
 ‘shall have had no opportunity of proceeding regularly to
 ‘adjudication within the six months, on account of the
 ‘absence of the said vessel, the court of admiralty shall, at
 ‘the instance of the recaptors, decree restitution to the
 ‘former owners, they paying salvage, upon such evi-
 ‘dence as to the court shall, under all the circumstances
 ‘of the case, appear reasonable; the expence of such pro-
 ‘ceeding not to exceed *fourteen pounds*.’

If a ship be re-
 captured before
 she is carried in-
 to an enemy’s
 port, she may,
 with the consent
 of the recaptors,
 prosecute her
 original voyage.

And the recap-
 tors shall not be
 obliged to pro-
 ceed to adjudi-
 cation, till after
 six months, or
 the return of the
 ship.

(a) Stat. 33 G. III, c. 66, § 44.

Sect. 5.

Of Loss by Detention of Princes.

BY the terms of the policy the insurer is answerable for all loss occasioned by "*arrests or detentions of all kings, princes, and people, of what nation, condition, or quality soever.*" Under these words, which are nearly the same in the policies of all the maritime countries of *Europe*, the insurers are liable for all losses occasioned by arrests or detention by the authority of any prince, or public body claiming to exercise sovereign power, under what pretence soever.

What shall be deemed an arrest and detention of princes.

As if the sovereign of the country to which a ship belongs, or any other sovereign, not at war with him, from motives of necessity, not of hostility, arrest the ship either singly, or together with others in the same port or harbour; this is a detention of princes (a).

Difference between capture and arrest of princes.

There is an obvious difference between capture and arrest of princes: The object of the one is prize; that of the other detention, with a design to restore the ship or goods detained, or to pay the value to the owner. And though neither of these should be done, still it must be considered as an arrest of princes, because the character of any action depends on the original design with which it was done.

If a ship be detained, upon a war breaking out; this is capture, not an arrest.

When a ship is detained in a port after a declaration of war, or the issuing of letters of reprisal; this more resembles a capture than a detention, and gives the insured an immediate right to abandon, as for a loss by capture, even though no condemnation be pronounced, and though the ship be afterwards restored (b).

An arrest of princes may be at sea as well as in port.

An arrest of princes may be at sea as well as in a port or harbour, provided it be done from public necessity, not with a view to plunder. *Roccus* (c) mentions

(a) Vid. *Le Guidon*, ch. 7, art. 6, and ch. 9, art. 6 and 13; *Valin*, tom. 2. p. 416.—(b) Vid. *Pothier*, h. t. n. 56.—(c) h. t. n. 60.

the case of a *Genoese* ship laden with corn, which was seized *at sea* by the *Venetian* gallics, and carried into *Corfu*, where there was a famine at the time, and there sold and paid for.—The insured instituted a suit in the *Rota* of *Genoa* against the insurers, and insisted that this was a *capture* for which they might abandon. The insurers answered that this was merely a *detention of princes*, the object of which was, not to capture the ship, but to purchase the corn which the necessity of the public required. *Diversio facta fuit, non ad capiendam navim, sed ob publicam utilitatem grani consequendi causâ. Licuit frumenta accipere, soluto pretio.*—This was held to be a good defence.

Seizing a corn ship at sea, for the relief of a place suffering under a famine, is only an arrest of princes, not a capture.

And yet, if a neutral ship be arrested at sea, and carried into a port belonging to one of the belligerent powers, under pretence that she belongs to the enemy, or that she is laden with enemy's goods; this must be considered as a *capture*, because it is done *as an act of hostility*; and the ship's being afterwards restored, will not change that which was originally a capture into a detention of princes (*a*).—But in the case of *Saloucci v. Johnson*, already particularly mentioned (*b*), the court of King's Bench determined, that the refusal of a neutral to submit to a search by a *Spanish* ship of war, and resisting with force, was no forfeiture of the ship's neutrality; and that the ship being arrested and carried into *Spain* for this resistance, the insured was intitled to recover against the underwriters as for "*an improper detention.*" And though it has since been determined, both in the court of King's Bench and the court of admiralty, that resisting a search is a lawful cause of capture and confiscation (*c*), yet the above case of *Saloucci v. Johnson*, may nevertheless, I conceive, be considered as an authority to prove that if a neutral ship be *unlawfully* arrested and detained by a belligerent cruiser for any pretended offence against the law of nations, this would be a detention of princes.

But if a neutral be taken at sea, under pretence that she is an enemy, this is a capture.

If she be unlawfully arrested under pretence that she committed some offence against the law of nations; this is an arrest of princes.

(*a*) *Emerig. tom. 1, p. 537.*—(*b*) *Sup. 301.*—(*c*) *Sup. 303.*

But if a ship be seized for navigating against the laws of a foreign state; this is not a detention of princes.

But if a ship misconduct herself; as by navigating against the laws of a foreign country, which she is bound to observe, or for not paying customs, &c. and thereby subject herself to seizure or confiscation; this shall not be deemed a loss by restraint or detention of princes (a); though, perhaps, it may amount to barratry of the master (b).

An embargo is the most frequent cause of detention.

The most frequent cause of detention is an embargo, which is a proclamation or order of state, usually issued in time of war or threatened hostilities, prohibiting the departure of ships or goods from some or all of the ports of such state until further order. An embargo laid on ships and merchandize in the ports of this kingdom by virtue of the king's proclamation, is strictly legal, when the proclamation does not contravene the ancient laws, or tend to establish new ones; but only to enforce the execution of such laws as are already in being, in such manner as the King shall judge necessary (c).

This, whether legal or not, is a detention within the policy.

But it is needless, in this place, to enlarge upon the right of our own sovereign, or that of any other, to lay embargoes. For whether an embargo be legally or illegally laid, the injury to the owner, by the detention of his ship or goods, is the same; and the insurer is equally liable for the loss occasioned by it.

The word *people* in the policy means a people, or nation, not a mob of lawless rabble.

By the word *people* in the policy is not to be understood any promiscuous or lawless rabble that may be guilty of attacking or detaining a ship: The following case will shew that it means a people; that is, a nation in its collective and political capacity.

A ship is forcibly seized by a tumultuous rabble: This is a loss by pirates, but not by detention of a people.

Nesbit v. Lubbock, 4 T. R. 783.

A cargo of corn and coals was insured from *Youghall* to *Sligo*, in *Ireland*.—The first count of the declaration, in describing the loss, stated that the ship, by stress of weather, was forced into *Elly Harbour*; where she was, with force and violence, attacked, boarded, arrested, and detained, by people to the plaintiff unknown; by reason whereof the corn was wholly lost. In the second count it was stated that

(a) Per Lord Commissioner *Hutchins*, 2 Vern. 176.—
(b) Vid. *Saloucci v. Johnson*, sup. 301.—(c) 3 Inst. 162, 4 Mod. 177, 179, 1 Bl. Com. 270.

the ship being in *Elly Harbour*, was with force and violence attacked and boarded, seized and taken, by certain pirates to the plaintiff unknown, whereby the corn was wholly lost.—The policy was in the usual form.—It appeared that the ship was forced by stress of weather into *Elly Harbour*; and there happening to be a scarcity of corn there at the time, the people came on board the ship in a tumultuous manner, and would not leave her till they had forced the captain to sell all the corn at a certain price, except 10 tons which was spoiled by the stranding and thrown overboard. The ship afterwards arrived at her destined port, with the coals. The court determined that this was a capture by pirates, and not a loss within the meaning of the words arrests, &c. of kings, princes, and people.—Lord *Kenyon* said the word people meant the ruling power of the country. Mr. Justice *Buller* said it meant the supreme power of the country, whatever that might be. This, he said, appeared by another part of the policy; for where the wrongful acts of individuals are mentioned, they are described by the names of pirates, rogues, thieves. Then, having specified all the individuals against whose acts the insurance is made, it specifies those occasioned by the acts of “kings, princes, and people of what nation, condition or quality soever; which must apply to “nations,” in their collective capacity (a).

If a *British* ship be arrested or seized by the authority of the *British* government, from state necessity; this shall be a detention within the meaning of the policy, for which the insurer is liable (b).

If a ship be seized by authority of the *British* government; this is a detention within the policy.

(a) *Roccus*, (h. t. n. 54), in the following passage, seems to interpret the usual words of the policy in a larger sense than that to which they are here restricted:—*Si merces captæ a potestate, seu iudice iustitiam administrante in illo loco, aut a populo aut ab alia quacunque persona, per vim, absque pretii solutione, tenentur asscuratores solvere æstimationem dominis mercium, factâ prius per dominos mercium cessione ad beneficium asscuratorum, pro recuperandis illis mercibus, vel pretio ipsorum a capientibus.*—
(b) *Vid. Emerig. tom. 1, p. 541. Ord. de la mar. h. t. 52. and Valin, tom. 2, p. 134.*

A British ship is seized at *Jamaica*, and converted into a fire-ship by the government there: It seems the insurer is liable.

Green v. Young, at N. P. 2 Lord Ray. 640, *Salk.* 444.

If a ship, insured at and from a certain port, be arrested in that port, this is an arrest within the policy.

As, where a ship was insured, "from her arrival at —" "in *Jamaica*, and during her voyage to *London*:"—An embargo was laid on the ship by the government, who afterwards seized her, and converted her into a fire ship, and offered to pay the owners.—The question was whether this would excuse the insurers. Lord C. J. *Holt* seemed to be of opinion that it would not; and that this was within the words *detention of princes*, &c.: But he gave no absolute opinion, because the cause was referred.

So, if a ship be insured "at and from" a given port, a detention by public authority, in that port, is a detention within the words of the policy. For the words of the policy being large enough to cover this risk, nothing but some express law or usage to the contrary can exempt the insurer (a).

Thus :

(a) Some doubt seems to have been entertained on this point. *Roccus*, n. 65, says, "Regis et principis factum connumeratur inter casus fortuitos; ideo, si rex et princeps retineant navem oneratam frumenta asportare ad locum destinatum, tenentur assuretores." This passage, and that which precedes it, plainly shew that the author meant a detention by the power under whose authority the ship was to sail. *Le Guidon*, c. 7, § 1, treating of abandonment, says, that the insured may abandon, "quand il advient du tout ou de partie, ou bien avarie qui excède ou endommage la moitié de la marchandise, quand il y a prise d'amis ou d'ennemis, arrest de prince, &c." The ord. de la mar. h. t. art. 52, contains these words. "Si le vaisseau étoit arrêté en vertu de nos ordres dans un des ports de notre royaume, avant le voyage commencé, les assureurs ne pourrout, à cause de l'arrêt, faire l'abandon de leurs effets aux assureurs." *Valin*, commenting upon this article, (vol. 2, p. 134), distinguishes the arrest of a foreign prince, from that made by order of the King of France; he also distinguishes an arrest in the port of loading, from an arrest in any other port of France, where the ship happens to put in; and he says that only in the latter case an arrest by the King is a ground to abandon. But *Pothier* (h. t. n. 59), and after him, *Emerigon* (vol. 1, p. 541), reject these distinctions, and maintain that the words, "avant le voyage commencé," mean before the risk is commenced; and that

Thus:—An insurance was made on three ships, *Adeleide*, *Adèle*, and *Victor*, their stores, &c.: Upon two of them, “*At and from L'Orient;*” and upon the third, “*At, and from, and after, her arrival “at L'Orient;*” and upon all of them, “*To all ports, seas, and “places whatsoever beyond, and on this side, the Cape “of Good Hope and Cape Horn, on the southern whale “and seal fishery and trade, and until their arrival back “at L'Orient.*”—An action being brought on this policy, the loss was stated in the declaration to have happened by the ships, their stores and provisions, being, by the authority of certain persons exercising the powers of government in *France*, at *Port Louis* with respect to one, and at *L'Orient* with respect to the two others, *arrested and restrained* from further prosecuting their voyages.—The *Adeleide* sailed from *L'Orient* on the voyage insured, but was obliged to put back by stress of weather, into *Port Louis*; and on the 5th of *February* 1793, while she lay there, the *Adèle* and *Victor* were preparing for their voyages, and before the necessary passports and clearances

A neutral ship and stores are insured *at and from* an enemy's port, and an embargo is there laid on by the enemy. This is an arrest of princes.—And if the embargo continue, the insured may abandon and recover as for a total loss.

Rotch v. Edie,
6 T. R. 425,
sup. 25.

if the risk be commenced before the arrest, the insured may abandon, upon an arrest even in the port of loading. *Le Guidon*, however, (ch. 9, art. 6), contains these words. “*Si le prince arrête le navire, comme s'il s'en voulout servir; s'il avoit affaire de portion ou de toute la marchandise; s'il ne veut permettre aux navires de sortir qu'en flotte, ou redoublement d'équipage, ou s'il prévoyoit à plus grand danger les arrestans pour quelque temps, l'assureur n'est en aucune indemnité quand telle chose avient dedans le même port, pour ce que ce sont des dangers de la terre, procedans du voploir du prince.*”—Upon this passage of *Le Guidon*, *Valin* (ubi sup.) observes, that whatever may be the King's motive for stopping the departure of a ship, the insurer has no right to abandon, but must wait till the king has withdrawn his orders, and it may be considered as one of the extraordinary and unforeseen events by which a voyage may be prolonged beyond its usual time. Lord *Mansfield*, in *Goss v. Withers*, 2 Bur. 696, seems to have adopted the doctrine as laid down by *Roccus*, and followed by *Pothier* and *Emerigon*; namely, that the insured may abandon in the case of a mere arrest, or an embargo, by any prince. Vid. post. chap. 14, on abandonment.

could be obtained, an embargo was laid on all vessels in those ports. The *Auslaide* was brought back to *L'Orient*, the perishable stores of all three ships were sold, and the ships themselves, with the rest of the stores, remained at *L'Orient* under the embargo, which still continued on all ships, destined for long voyages. The *Adèle* and *Victor* had entered outward upon their respective voyages, when the embargo came; and that alone prevented them from sailing. Notice of abandonment was given to the underwriters, on the 27th of *February* 1793, and a total loss claimed, and the same repeated in *August* following. The plaintiff, who then resided in *England*, was a subject of the the United States of *America*, and formerly resided several years in *London*, but, for some years previous to the insurances in question, had dwelt at *L'Orient*, and was jointly concerned in the Southern whale fishery with Mr. *Bernard* a native of *France*, resident at *L'Orient*, and whose interest was separately insured.—On the trial of the cause a special case, stating the above facts, was reserved for the opinion of the court; and it was contended on the part of the underwriters,—1st, That an embargo at the loading port to which the ship belonged, and where the insured owed a temporary allegiance to the governing power, was not a risk within the meaning of the policy, because like sea-worthiness, it is a condition necessarily implied in the contract of insurance, that the ship may legally sail from the loading port. 2dly, That there was no loss in regard to the subject-matter of the insurance, which is on the ship, &c. 3dly, That the plaintiff had no right to abandon as for a total loss, under the particular circumstances of this case.—The court, however, determined in favour of the plaintiff on all these points.—As to the *first*, they held, that the terms of the policy were sufficiently large to extend to this case; and that it was incumbent on the defendant to have shewn some case in which it was otherwise decided; but all the authorities, both *English* and foreign, were in favour of the plaintiff. That the plaintiff was not an alien enemy, but a native of *America*, then resident in *England*, and therefore under no disability

disability to sue in this case, and the consequence of allowing this objection, would be to render it illegal to insure the property of a neutral, in an enemy's port. As to the *second* point, the court held that as the insurance was not only on the ship, but on the stores, provisions, and fishing tackle, which were lost to the plaintiff; and as the voyage was lost in consequence of the detention of the ships, this was a loss within the policy, and a very different case from that of *Robertson v. Ever* (a), to which it had been compared.—Upon the last point, the court was of opinion, that the plaintiff had as much right to abandon in this case, as in the case of a capture by an enemy; and for this the doctrine of Lord Mansfield in *Goss v. Withers* (b) was much relied on.

If a ship be seized after a cessation of arms and preliminary articles of peace are signed, this shall not be deemed a capture, but only an arrest of princes.

As, where the plaintiff had caused himself to be insured "on the *Prince Frederick* from *Vera Cruz* to *London*, interest or no interest, free of average, and without benefit of salvage."—The ship was afterwards seized by order of the Viceroy of *Mexico*, and the *Spaniards*, having taken out the *South Sea Company's* arms, and made several alterations in her, turned her into a ship of war, and sent her as commodore with a squadron of men of war to the *Havannah*, there being a war at that time between *England* and *Spain*; and *Gibraltar* was actually besieged by the *Spaniards*.—In an action on the policy (d), the defendants proved the signing of the preliminary articles of peace before the seizure of the ship, and therefore insisted that this seizure did not alter the property, and consequently the defendants were not liable: For if the pro-

A seizure, after a cessation of hostilities; is an arrest of princes.

An *English* ship is seized by the *Spaniards*, and converted by them into a ship of war: But it appearing that this was after a cessation of arms, and preliminary articles of peace signed, and the ship having been restored; this was held not to be a capture, but only a detention of princes.

Spencer v. France, at N. P. December 1736, *Beaumes* 4th edit. p. 316 (c).

(a) 1 T. R. 127, inf. c. 17, § 5.—(b) 2 Bur. 583, inf. c. 14, § 2.—(c) This case, which is found in the 4th edition of *Beaumes* but not in the 5th, is so imperfectly reported that it cannot be much relied on as an authority: Yet, being cited by Lord Mansfield in the case of *Hamilton v. Mendes*, 2 Bur. 1211, I thought it ought not to be passed unnoticed here.—(d) The plaintiff it may be presumed declared only upon a loss by capture.

perty was not altered, this insurance, made by the plaintiff without interest, could not bind; as nothing came within the policy but a total loss: And though there be those general words, "*restraint, or detainment of princes.*" — Lord C. J. *Hardwicke* declared that a war might begin without an actual declaration or proclamation, as in this case, by laying siege to *Gibraltar*; that as a war might begin by hostilities only, so it might end by a cessation of arms; and these preliminary articles being signed before the seizure of the ship, and there being a cessation of arms, he thought the taking of the ship afterwards not to be a taking by enemies, unless the jury took the capture to begin from the time the *South Sea* arms were taken out, which was before the articles: That supposing the ship not taken by enemies, whether the detention for near a year was, in this sort of policy, viz. *interest or no interest*, a detention within the policy; or whether in such policies, the insurers are ever liable but in case of a total loss; and if so, the ship being afterwards restored, he directed the jury to find for the defendants, which they accordingly did.

Sect. 6.

Of Loss by Barratry.

Barratry defined.

BARRATRY, (which is derived from the *Italian* verb *barratrare*, to cheat), may be defined to be, any species of fraud, knavery, deceit, or cheating, committed by the master or mariners, whereby the owners sustain an injury: As by running away with the ship, wilfully carrying her out of the course of the voyage prescribed by the owners, sinking or deserting her, embezzling the cargo, smuggling, or any other offence whereby the ship or cargo may be subjected to arrest, detention, loss, or forfeiture (a): Barratry, in short, comprehends every fraud that may be committed by the master or mariners against the owners;

(a) Vid. *Salucci v. Johnson*, sup. 391.

and

and therefore, where the breach assigned in the declaration on a policy was, the loss of the ship, "by the *fraud and negligence* of the master," it was determined that this was a sufficient averment of a loss by barratry (a).

At *Amsterdam, Hamburgh, Middleburgh*, and some other maritime towns, insurers are, by *positive law*, made responsible for the barratry of the master and mariners (b). At *Rotterdam* the owners of ships are prohibited from insuring against the barratry of the master whom they themselves appoint. But they are permitted to insure against his neglect, against the barratry of the sailors, and of such master as may succeed to the command in foreign parts without their knowledge, upon the decease or absence of the master originally appointed (c).

Whether insurance against barratry ought in all cases to be permitted.

Lord *Mansfield* thought it extraordinary that barratry should ever have crept into insurances, and still more that it should have continued in them so long; thus making the underwriter become insurer of the conduct of the captain whom he does not appoint, and cannot dismiss, to the owners who can do either (d).

Roccus (e) holds that the insurer cannot be made liable for barratry, if the insured be the owner of the ship; but if he only *charter* the ship, he may insure against barratry; because in that case, the owner of the ship appoints the master. But where the owner of the goods appoints the master, it is holden that he cannot be insured against barratry (f).

In *France* the insurer was formerly answerable, *ipso jure*, for the barratry of the master (g). But, by the ordinance of the marine (h), this liability is confined to cases, where the policy expressly includes barratry; and *Emerigon* (i) even insists that the owner of the ship cannot be

(a) *R. Knight v. Cambridge*, 1 Str. 581, 2 Lord Ray. 1349, inf. ch. 17, § 2.—(b) 2 Mag. 73, 130, 215.—(c) Vid. *Roccus*, n. 27, *Emerig.* tom. 1, p. 370.—(d) 1 T. R. 330.—(e) h. t. n. 44.—(f) Quando navarcus positus est à domino mercium, tunc affecuratus sibi debet imputare quod talem præpositum elegerit, et affecurator non tenetur. *Casaregis*, dif. 10, n. 14; dif. 1, n. 75.—(g) Vid. *Le Guidon*, ch. 5, art. 6, ch. 9, art. 8, 12.—(h) h. t. art. 28.—(i) Vol. 1, p. 369.

insured against barratry of the master, because, he is himself answerable, according to the rule of the *Roman law* (a), for the conduct of the master whom he employs; and if the owner be himself answerable to third persons for the barratry of the master, he cannot, as insured, throw this burthen on the insurer, who would have an immediate remedy against him, as owner, to recover back the same loss; a circuity of action which the laws of no country would endure.

Upon the same principle *Emerigon* also holds that if the captain be commissioned to dispose of an adventure on board, the insurer of such adventure shall not be answerable for the loss of it, occasioned by the fault of the captain; for this would be, to make the insurer answerable to the insured for the faults of his own agent (b).

But the objections to the policy of permitting insurances against barratry, in the case of the owner of the ship, however well founded, do not apply to the insurance of goods in a general ship, which carries the goods of every man who chuses to put them on board; for, in that case, the owner of the goods does not appoint the master, nor has he any control over either him or the ship. It is probable that cases like this, first gave birth to the practice of insuring against barratry; and that this, in process of time, was indiscriminately introduced into all policies.

But even in the case of a particular ship, freighted entirely by a single person, it may in general be presumed that if the insurer does not know the master, or at least his character, it is his own fault, as every policy specifies the master; but then it is generally provided that any other person, at the election of the insured, may go as master; and by permitting this clause to stand in the policy, the insurer waves all personal knowledge of the master, and therefore no objection can fairly be made of the want of such knowledge (c).

(a) *Omnia facta magistri debet præstare qui eum præposuit* ff. l. 1, § 5, de exercit. act. Ex delicto cujusvis eorum qui navis navigandæ causâ in nave sunt datur actio in exercitorem, id. § 2.
—(b) *Emerig.* tom. 1, p. 370.—(c) *Vid. Roccus, h. t. n. 27. Corp. 153. Vid. sup. 22r.*

And though barratry cannot properly be called a peril of the sea, because it does not arise *ex marina tempestatis discrimine*, yet it is a risk, and a very great one, incident to sea voyages, because merchants are obliged to confide their ships and merchandize to the care of mariners, who may sometimes so far forget their duty, as to betray the great trust reposed in them. Unless, therefore, the merchant could be protected by insuring against this risk, few men of small capitals would expose themselves to it. For this reason the law, with us, permits even the owner of the ship to be insured against the misconduct of the captain and crew, though they are his own agents, and the persons of his own choice.

If the captain be the insured, no agreement on the part of the insurers can make them liable for barratry committed by himself (a); but they may be liable, in such case, for the barratry of the sailors, in which he has no part (b).

The captain may be insured against the barratry of the sailors.

Still, however, it must be owned that cases sometimes occur which tempt one to think that it might, perhaps, be the wisest policy to impose some restraint upon unqualified insurances by *owners of ships*, against this species of risk. It would at least have the effect of making them more circumspect in the choice of the persons to whom they confide so great a charge.

Valin (c) and *Potbier* (d), (adopting the doctrine of *Le Guidon* (e),) hold that barratry comprehends every fault, either of the master or mariners, by which a loss is occasioned, whether arising from fraud, negligence, unskilfulness, or mere imprudence; and in this sense it seems to be understood in the *French* ordinance of the marine (f).

What shall be deemed barratry.

But with us, no fault of the master or mariners amounts to barratry, unless it proceed from an intention to defraud the owners of the ship (g). Therefore if the

A deviation not proceeding from fraud, is not barratry.

(a) *Le Guidon*, ch. 15, art. 4; *Valin*, h. t. art. 27, p. 75; *Potbier*, h. t. n. 65.—(b) *Emerig.* tom. 1, p. 371.—(c) On art. 28, h. t. tom. 1, p. 79.—(d) h. t. n. 65.—(e) Ch. 5, art. 6, ch. 9, art. 1, 8.—(f) h. t. art. 28.—(g) *Non omnis navarci culpa est barataria, sed solum tunc ea dicitur, quando committitur cum præexistenti ejus machinatione, et dolo præordinato ad casum.* *Casaregis*, dis. 1, n. 77.

master, from *ignorance, unskilfulness*, or from any motive which is not *fraudulent*, depart from the proper course of the voyage; this will be a deviation which will avoid the policy, but it will not amount to barratry.

In a voyage from London to *Jamaica*, the captain loses his reckoning; and when he discovers his situation, instead of steering directly for *Jamaica*, bears up for an island out of that course: This is a deviation, but being without any fraudulent intention, is not barratry.

Phyca v. Roy.
Ex. Assur. 7
T. R. 505.

Thus:—Goods were insured from *London* to *Jamaica*, and it appeared that the captain's instructions were to proceed immediately to *Jamaica*: But after the ship had cleared the *Channel*, she was carried by currents and other causes, out of her reckoning, till she was found to be between the *Grand Canary* and *Teneriffe*. From this situation her direct course to *Jamaica* was to the south-west, instead of which, the captain bore up for *Santa Cruz*, to the north-west about 30 miles, where she came to an anchor. There, an embargo was laid upon her; soon after which, news arrived of war having been declared between *Spain* and *Great Britain*, and the ship and cargo were seized and condemned as prize.—In an action on the policy, the declaration contained two counts; one for a loss by *capture*, the other for a loss by *barratry*. And it was contended on the part of the plaintiff, that he was necessarily intitled to recover on one count or the other: On the first, if there was no deviation; or, admitting that the ship's going to *Santa Cruz* instead of proceeding to *Jamaica*, after the captain knew with certainty where he was, was a deviation, still it was a wilful deviation by the captain, against his instructions, merely to procure a temporary refreshment, and no benefit to the owners, and therefore an act of barratry.—Lord *Kenyon*, who tried the cause, said, that it could not be barratry, without a fraudulent purpose in the captain at the time; and with that direction he left it to the jury, who found "that the captain's going to *Santa Cruz* was a deviation, and "was owing either to ignorance or something else, but "that it was *not fraudulent*;" and they accordingly found for the defendants.—Upon a motion for a new trial, the court were clearly of opinion that there must be *fraud* to constitute barratry; and as the jury had expressly negatived fraud, there could be no barratry.—Mr. Justice *Lawrence* said he knew of no case in which it is said that the act of the captain is barratry, merely because it is against

against the interest of the owners; it must be done with a *criminal intent*: That, in this case, the jury having negatived fraud, had negatived criminality in the captain; and therefore this was not a barratrous deviation.

In *France*, if by the policy the insured be protected against the barratry of the *master*, the underwriters are answerable for the misconduct of the *mariners* also; because the word *master* (*patron*) comprehends all the persons on board who are in the ship's pay (a). Our policies are more explicit, and distinctly specify barratry of the *master* and *mariners*. I should conceive, therefore, that with us, as in *France*, the mariners may commit barratry, without the concurrence of the master, or against his will. In the following case, however, Lord C. J. *Lee*, at *nisi prius* held, that a deviation to which the master was compelled by a very daring act of violence and disobedience on the part of the seamen, did not amount to barratry, because the ship was not actually *run away with in order to defraud the owners*.

That was the case of a letter of marque, insured for a voyage "from *Bristol* to *Newfoundland*."—She sailed with express orders that, if she should take any prize, she should nevertheless proceed on her voyage, and that some hands should be put on board the prize, and sent with it to *Bristol*.—A prize was taken in the course of the voyage; and the captain ordered some of the crew to carry the prize to *Bristol*, while he proceeded on his voyage: But the crew opposed him, and insisted on his going back, though he acquainted them with his orders; and he was forced to submit, and on his return, his own ship was taken.—The underwriters insisted that this was a deviation which discharged them.—The plaintiff contended that it was *barratry*.—But Lord C. J. *Lee* was of opinion

Whether barratry may be committed by the seamen without the participation, or against the will, of the captain.

A deviation, occasioned by the disobedience of the seamen, has been holden not to be barratry, unless it be done with intent to defraud the owners.

A letter of marque having orders in case she should take a prize, to send it home, and proceed on her voyage; but the master being compelled by the sailors, returns back with the prize: This is not barratry.

Elton v. Brogden, 2 Str. 1264. Sup. 413.

(a) Les assureurs ne répondent pas des méfaits des mariniérs, à moins que par la police ils ne soient chargés de la *baratterie du patron*. Le mot *patron* comprend ici tous ceux qui sont aux gages du navire. *Emerig.* t. 1, p. 381, 2. Vid. *Valin*, t. 2, p. 3.

that

that it did not amount to barratry, as the ship was not run away with *in order to defraud the owners*: Neither was it a case of wilful deviation, but of deviation occasioned by the force upon the master which he could not resist, and therefore excused by the necessity. The insurers were therefore held to be answerable, and the plaintiff had a verdict.

And yet if the captain cruise in quest of prize, contrary to his orders, this is barratry, though done for the benefit of the owners as well as the crew.

The learned judge who tried this cause, and who was in general a master of all the learning of his time on the subject of insurance, seems to have thought that nothing short of running away with the ship, with intent to defraud the owners, amounted to barratry. What the seamen did in that case was but one degree short of such a crime. In the following case which we have already had occasion to mention, the conduct of the master was held to be barratry, though certainly much more venial than that of the sailors in the above case.

Moss v. Byrne,
6 T. R. 379.
Sup. 1795.

A ship was chartered for a voyage from *Liverpool* to the *Bahamas* and back, and on her return from the *West Indies*, letters of marque were taken on board, merely to entice seamen to enter, but without the necessary documents to give them validity, *and without any intention of cruising in quest of prizes*; and it was a part of his written instructions, before he sailed, to proceed to *Liverpool* with all expedition. A few days after the ship sailed, however, the captain, with the concurrence of the majority of the seamen, determined to cruise for prizes; and he soon fell in with an *American* whom he plundered and afterwards discharged. He then cruised for some days out of the course of the voyage, and captured a ship of the enemy which he sent to *Bermudas*, where he followed her himself, and there libelled her as prize in the court of admiralty, in the name of himself and *his owners*. But during his stay there his ship was stranded, and the cargo lost. He directed that the cruising should not be mentioned in the log-book: In an action to recover as for a loss by barratry, it was contended on the part of the underwriters, that this could not be barratry, in as much as the act of the captain, however reprehensible in other respects,

respects, was done with a view to benefit, not to prejudice, his owners. But the court held this to be barratry; and that the stopping and plundering the *American* ship was of itself an act of barratry in the master, independent of his taking the prize, this being contrary to his duty to his owners, and to their prejudice; because, by the charter-party, they had stipulated that the ship should sail directly to *Liverpool*, and they were therefore liable for any damage that might happen in consequence of any wilful deviation. And though the captain might conceive that what he did was for the benefit of the owners; yet, if he acted contrary to his duty to them, it was barratry.

Though the captain conceive that what he does is for the benefit of the owners; yet, if it be contrary to his duty to them, it is barratry.

Barratry can only be committed by the master and mariners, by some act contrary to their duty, in the relation in which they stand to the owners of the ship. It is therefore an offence against them, and consequently an owner himself cannot commit barratry. He may, by his fraudulent conduct, make himself liable to the owner of the goods on board, but not *for barratry*. Neither can barratry be committed against the owner, *with his consent*; for though he may be liable for any loss or damage occasioned by the misconduct of the master, to which he consents, yet this is not barratry. Nothing is more clear than that a man can never set up as a crime an act done by his own direction or consent. These points will be found fully established in the two following cases.

Barratry can only be committed against the owners of the ship, and therefore it cannot be committed with their consent.

In the first of these cases it appeared that a ship was advertized to go to *Marseilles*, goods were shipped on board her, and the master signed a bill of lading, whereby he undertook to go straight to that place, and the goods were insured, "from *Falmouth*, (where they were to be taken in), to *Marseilles*." Before the ship departed from the port of *London*, another advertisement was published for goods to *Genoa*, *Leghorn*, and *Naples*, and the plaintiff's agent was told that it was intended to go to those ports first, and then come back to *Marseilles*; but he insisted that his bargain was to go directly to *Marseilles*; and he would not consent to let her pass by *Marseilles* or alter his insurance.—The ship, however, did pass by *Marseilles*; and after delivering her cargo at the other

A ship is engaged to carry goods straight to *Marseilles*; but instead of going thither direct, she goes first to *Genoa* and *Leghorn*; This being done by the authority of the owner, and for his benefit, and no fraud being intended; it is not barratry.

Stannus v. Brown, 2 Str. 1173.

ports, set out on her return for *Marfeilles* with the plaintiff's goods; but, in her voyage thither, was blown up in an engagement with a *Spanish* ship of war. The plaintiff declared as for a loss by the barratry of the master.—Lord C. J. *Lee* told the jury that this voyage, being against the express agreement to proceed straight to *Marfeilles*, seemed to be more than a common deviation, as it was a formed design to deceive the plaintiff; and compared it to the case of sailing out of port without paying the duties, whereby the ship was subjected to forfeiture, which had been holden to be barratry.—The jury, after staying out some time, returned and asked the Chief Justice, whether, if the master was to have no benefit to himself by passing by *Marfeilles*, and went only to the other places first, for the benefit of his owners, that would be barratry; and the chief Justice answering, No, they found for the defendant.—On a motion for a new trial, the court, after argument, were unanimously of opinion that the verdict was right: For the master had acted consistently with his duty to his owners, and the plaintiff's agent knew of the intended alteration, before the goods were put on board; and might have refused to ship them, or have altered the insurance: That to make it barratry there must be something of a criminal nature, as well as a breach of the contract; and that here, the breach being assigned only on the barratry, was not supported by the evidence.

After bills of lading are signed by the captain, and delivered to the owner of goods, the captain, at the instance of the owner, signs new bills of lading, changing the destination of the ship; and by this contrivance the goods are disposed of for the use of the owner of the ship, and in fraud of the owner of the goods. This being done with the concurrence

The other was the case of an insurance effected on behalf of *Hague*, before he became bankrupt, on goods on board the *Rachette* from *London* to *Rochelle*. In an action on this policy it appeared that the master, by the instigation and direction of *Le Grand*, the owner of the ship, went with the ship and cargo to *Bourdeaux*, instead of *Rochelle*, where the cargo was sold by the agent of *Le Grand*: That a petition was presented by the insured to the admiralty of *Guienne*, stating that *Le Grand*, partner in a house at *Rochelle*, being in *London* with his ship, and in want of a cargo to return home, applied to *Hague*, who agreed to supply him with goods, which were loaded on board the ship, for account of *Le Grand*: That as *Hague* did not know the house of *Le Grand*, it was agreed between

tween him, *Le Grand*, and the captain, that the bills of lading should not be delivered to *Le Grand* but at *Rochelle*, after he should have paid the amount to the agent of *Hague*, in good bills, and, in default, that the goods should be received by *Hague's* agent for his account, free from freight, &c.: That the captain accordingly delivered bills of lading to *Hague*, who forwarded them, together with the contract, to his agent at *Rochelle*, with orders to receive the goods on the arrival of the ship, or deliver them to *Le Grand* if he should fulfil his agreement. That, upon the ship's arrival at the harbour of *Rochelle*, *Le Grand* went on shore, got secretly into the town, where, having consulted with his partners how to elude the precautions taken by *Hague*, returned on board, and got the captain fraudulently to sign other bills of lading, by which he reserved to himself the liberty of putting into *Rochelle* or *Bordeaux*; and by means of the false bills of lading, and by the contrivance of *Le Grand*, the goods were there put into the hands of *Le Grand's* agent. That *Hague's* agent on hearing of this, applied to the house of *Le Grand*, who gave him bills for the whole amount, but which were afterwards dishonoured; and thereupon the agent attached the cargo in the hands of the several persons who held it: That the house of *Le Grand* having delivered a false account to their creditors, a release was granted them from all attachments and executions, confirmed by the Parliament of *Paris*, with an injunction to all persons arresting their goods to restore them: That, in consequence of this petition, the court of admiralty at *Bordeaux* decreed that the captain was guilty of barratry, for having signed false bills of lading, in order to change the voyage, and carry away the goods; for which they condemned him to the galleys for life: They also declared *Le Grand* to be an accomplice in the said barratry of the master, and guilty of robbery in causing the ship to be brought into *Bordeaux*, and condemned him to the galleys for five years: That they likewise condemned the captain and *Le Grand* to pay the value of the goods, with the charges, &c.—Upon this case it was contended on the part of the plaintiff, that the fraudulent conduct of the

of the owner, is not barratry.

Nutt and others, assignees of Hague v. Bourdeux, 1 T. R. 323.

captain amounted to barratry.—But the court were clearly of opinion that this could not be barratry, and that the plaintiff ought not to recover.—Lord *Mansfield* said,—“The sentence of the *French* court of admiralty, which declared the master and owners to have been guilty of barratry, is entirely out of the question: For, though it was a most righteous judgment, yet it was no part of the consideration of that court, what was meant by barratry in an *English* policy. Their idea of barratry was manifestly different from the construction put upon that word in our own courts; for they had found the *owner* guilty of barratry, which was entirely repugnant to every definition of barratry which had ever been laid down in an *English* court of justice:—The point to be considered is, whether barratry, in the sense in which it is used in our policies, can be committed against any but the owners of the ship. It is clear beyond contradiction that it could not; for barratry is something contrary to the duty of the *master* and *mariners*, the very terms of which imply that it must be in the relation in which they stand to the *owners of the ship*. An owner, therefore, cannot commit barratry. He may make himself liable by his fraudulent conduct to the owner of the goods, but not as for barratry. And, besides, barratry can not be committed against the owner *with his consent*: For though the owner may become liable for a civil loss, by the misbehaviour of the captain, if he consented, yet that is not barratry. Barratry must partake of something criminal, and must be committed *against the owner*, by the master or mariners.”

If the same person be both owner and master, he cannot commit barratry.

If the master of the ship be also the owner, he cannot commit barratry, because he cannot commit a fraud against himself. And even where he has mortgaged the ship, and the legal title is in another, and he has only the equity of redemption, yet he is still so far the owner that he cannot commit barratry.

The owner mortgages the ship, and acts as master while he is possessed of the equity of redemption: He cannot commit

Thus:—An insurance was made on a voyage “From *London to Marseilles*, and from thence to some port in *Holland*.”—The ship failed to *Marseilles*, and there the master, instead of pursuing his voyage to *Holland*, failed

to

to the *West Indies*, where he sold the ship, and died insolvent.—An action at law being brought by the insured for a loss occasioned by the *barratry of the master*, the underwriter brought his bill in Chancery for an injunction to stay the proceedings at law; suggesting that *the master was also the owner of the ship*; that he had, before the voyage, entered into a bottomry bond to the defendant for 200 l.; and though he had afterwards, by a bill of sale, assigned over his interest in the ship to the defendant as a security for the 200 l., yet, it was insisted that, in equity, the captain was still to be considered as the owner of the ship, though in a court of law, the legal title would be looked upon to be in the defendant; and that the owner of the ship could not, either in law or equity, be guilty of barratry. The matters of fact being admitted, an injunction was moved for, on the principle that a mortgagor is to be considered in equity as the owner of the thing mortgaged, and that the master being owner, could not be guilty of barratry. Lord *Hardwicke* C. granted the injunction.—He said,—“Barratry is an act of wrong done by the master against the ship and goods; and this being the case of a ship, the question will be, Who is to be considered as the owner? Several cases might be put where barratry may be assigned as the breach of an insurance; and barratry or not, is a question properly determinable at law: But in this case it is not so; for courts of law will not consider a mortgagor as having any right or interest in the thing mortgaged; and a man may frequently come into equity for relief in respect of a part only of his case. It might, indeed, be considered at law, whether, what the master has done, whether he be owner or not, did not amount to a breach of the contract as master, and so to a barratry: It may likewise be so considered in this court. But at law a defendant cannot read part of a plaintiff's answer to a bill filed against him here: The whole answer must be read, which has often been a reason for this court to interpose by injunction upon a plaint at law; and considering the mixed nature of this case I think an injunction ought to be granted.”

barratry being
still considered
as owner.

Lewis v. Snares,
Post. Dict. vol.
1, p. 147.

But a general freighter is considered as owner for the voyage; and a deviation without his knowledge, though with the consent of the original owners, is barratry.

Vallejo v. Wheeler, Cowp.
143.

Yet, where a ship is let out to freight generally, the freighter is considered as the owner for that voyage; and a deviation for an illegal purpose, without the knowledge or consent of the freighter, will be barratry, though it be with the consent of the original owner. This will appear from the following case.

An insurance was made in the common form on goods, "From *London* to *Seville*, with liberty to touch at any "ports or places, &c."—In an action on the policy, the loss was alledged different ways in the declaration; *first*, that the ship, by storms and perils of the sea, was forced to go to *Dartmouth* to be repaired; and that afterwards a further loss happened by storms, &c.: *secondly*, that it happened by storms, &c. in the voyage generally; and *thirdly*, by the barratry of the master.—At the trial it appeared, that the ship was put up as a general ship from *London* to *Seville*, and was let to freight by one *Willes* to *Darwin* (a). That it is the course for vessels going on the voyage, to stop at some port in the west of *Cornwall*, to take in provisions. That this ship having taken her cargo on board, sailed from *London* to the *Downs*, and while she lay there, all the other ships bound to the westward bore away; but she staid till the night after, and then sailed to *Guernsey*, which was out of the course of the voyage: That the captain went there for his own convenience, to take in brandy and wine on his own account, after which he intended to proceed to *Cornwall*. That the night after she quitted *Guernsey* she sprung a leak, which obliged her to put into *Dartmouth*. When she was refitted she sailed again, and proceeded for *Hel-ford* in *Cornwall*, where it was always intended she should stop and take in provisions; but in her way, she received further damage, and at her arrival was totally incapable

(a) Mr. *Cowper's* report of this case states *Darwin* to have chartered the ship to *Brown* the captain. Mr. Justice *Butler* in 1 T. R. 330, says that the error should be corrected by stating that the ship was chartered by *Brown* to *Darwin*, and not by *Darwin* to *Brown*. But it appears by the subsequent part of the report that *Darwin* freighted the ship from *Willes*.

of proceeding on the voyage, and the goods insured were much damaged.—It was attempted, on the part of the defendant, to prove that the voyage to *Guernsey* was on account of *Willes*, the owner of the ship, and that the goods taken on board there were his property: But this evidence went little further than information and belief, except that when the ship arrived at *Helford* the wine was delivered into his cellar.—Mr. Justice *Asburst*, who tried the cause, told the jury that if the going to *Guernsey* was without the knowledge of *Darwin*, it was barratry; and they ought to find for the plaintiff: But if done with his knowledge, then it was not barratry: And if they should be of opinion that it was without the knowledge of *Darwin*, then, he desired them to say whether they thought it was with the knowledge of *Willes* or not (a). The jury found for the plaintiff, and said they thought the going to *Guernsey* was without the knowledge of *Darwin*, whom they looked upon to be the owner, but they thought it was with the knowledge of *Willes*.—Upon a motion for a new trial, two questions were made: *First*, Whether the conduct of the master, in going to *Guernsey*, for the purpose, and under the circumstances, above stated, was barratry: Supposing this to be barratry, then *secondly*, whether, to entitle the plaintiff to recover, the loss must not have happened during the time of the barratry, or have been occasioned immediately by the act of barratry: Here the goods were not seized for smuggling, nor did the loss happen till after the act of barratry.—The court, after two arguments, were unanimously of opinion that this was barratry.—They said that if a ship be let out generally to freight, the freighter is owner for that voyage; but if there be only a covenant to carry goods, the

(a) There seems to be some error in this part of the report. The first part of the direction of the learned judge takes it for granted that *Darwin* was the owner. If so, it could not be material to enquire whether the deviation was with, or without, the knowledge of *Willes*. It would seem from the finding of the jury, that it had been left to them to say which of the two was the owner.

owner of the ship would have the direction of her, and the hiring of the master and mariners. That though *Willes* was originally the owner, and not being the insured here, every thing relating to him might be laid out of the case, and that the jury, therefore, did right in considering *Darwin* as owner *pro hac vice*: That *Darwin* being the freighter, and owner of the goods on board, any fraud committed on the owner, must be committed on him: That the master had agreed to go on a voyage from *London* to *Seville*; *Darwin* trusted he would set out immediately; instead of which he went on an iniquitous scheme, totally distinct from the purpose of the voyage to *Seville*; that this was a cheat and a fraud on *Darwin*, and was therefore barratry; which is not confined to the running away with the ship, but comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured; and whether the loss happened in the act of barratry; that is, during the fraudulent voyage, or after, was immaterial; because the voyage was equally altered, even though there was no other iniquitous intent. But, independently of this, the judges seemed to think that the loss, in the present case, was sustained in consequence of the alteration in the voyage. The moment the ship was carried from her right course, it was barratry, and the loss happened in consequence. But supposing the loss to have happened afterwards, the insured, if not protected against the barratry of the master, would have lost his insurance by the fraud of the master; for it was clearly a deviation, and he could have no remedy against the underwriters for a loss in consequence of a deviation.

Though barratry must be strictly proved; yet proof that the master committed barratry is *prima facie* sufficient, without shewing negatively, that he was not owner, &c.

Though it is a maxim in law that fraud shall never be presumed, but must be strictly proved; and it is a rule in questions of insurance, that he who charges barratry must substantiate it by conclusive evidence (a); yet in the

(a) *Baratarie crimen nunquam est presumendum, sed concludentissime probandum. Casaregis, disc. 1, n. 60; disc. 225, n. 99; disc. 226, n. 6. Vid. Emerig. tom. 1, p. 372.*

following

following case it was determined that proof of the master's having carried the ship out of the regular course of the voyage for fraudulent purposes of his own, is *prima facie*, sufficient to entitle the plaintiff to recover; without shewing negatively that he was not the owner, or that any other person was the owner, or that this was not done with the owner's consent.

Goods were insured on board the *Live Oak*, *Joseph Rati* master, "at and from *Jamaica* to *New Orleans*."—In an action on the policy, there were two counts in the declaration; the first alledging a loss by the barratry of the master; the second by the perils of the sea.—Upon the trial, it appeared that the ship was put up as a general ship at *Jamaica*, that she sailed on the voyage insured in *May* 1783. That the plaintiff, amongst others, shipped the goods in question, and in *June* following, arrived in the mouth of the *Mississippi*, which leads up to *New Orleans*, in *Spanish America*, at the distance of 35 leagues. When the captain had got thus far, he dropped anchor, and went in his boat up the river to *New Orleans*, and, on his return, without carrying the ship to her port of destination, stood away for the *Havannah*, after which he was never heard of. It appeared that he had a private adventure of negroes of his own on board, which there was reason for supposing he intended to dispose of at *New Orleans*; but finding it difficult to do so on account of an interdiction by the *Spanish* government against the importation of them there, he went to the *Havannah* in quest of a market for them. The defendants, without offering any evidence, insisted that, upon the plaintiff's own shewing, he could not recover. Upon the first count, there was no evidence to shew that the captain was guilty of barratry; for *non constat* that he was not himself the owner or general freighter of the ship; or if not, that he had acted contrary to the directions of the owner in going out of the original course: And as to the second count, there was a clear deviation which discharged the underwriters.—Lord *Kenyon* who tried the cause, was of opinion that barratry was sufficiently proved, and that therefore the plaintiff was intitled to recover on the first count,

and

Goods are insured from *Jamaica* to *New Orleans*, and the master anchors in the mouth of the *Mississippi*, goes up to that place in his boat for a fraudulent purpose, and on his return, stands away for the *Havannah*: Proof of these facts is sufficient evidence of barratry, without shewing negatively that the master was not owner or general freighter.

Ross v. Hunter,
4 T. R. 33.

and the jury found accordingly.—Upon a motion for a new trial, the court were clearly of opinion that the evidence was sufficient to support the verdict. The ship was a general ship, of which *Rati* was proved to be captain, which is *prima facie* evidence that he was not owner. There was no proof of his being owner; and if that fact were necessary to constitute the defence of the underwriter, the affirmative proof lay upon him. For the same reason, if *Rati* had been general freighter, that ought to have been proved by the defendant.—Mr. Justice Buller also held, that the very dropping of the anchor in the mouth of the *Mississippi*, being with a fraudulent view, was an act of barratry.

Even dropping anchor with a fraudulent view, is an act of barratry.

Though the words "in any lawful trade" be inserted in the policy, still the insurer is liable, if the captain commit barratry by smuggling on his own account.

*Blankley v. Win-
funley*, 3 T. R.
279.

If a ship be insured for a term, in any lawful trade, and barratry be one of the risks mentioned in the policy, the underwriters are answerable for barratry of the master by smuggling; for *lawful trade* in the policy means the trade in which the ship shall be employed by the owners, and not any unlawful commerce in which the captain may be engaged without their concurrence.

As, where a ship was insured for twelve months, in any lawful trade, to commence on her sailing from *Sunderland*; and barratry of the master and mariners was one of the perils set forth in the policy.—The declaration alledged, that the ship sailed in a lawful trade from *Sunderland*, and afterwards sailed on a voyage from *Offend* to *Sunderland*, but put into the port of *Shields*, where the master, in a barratrous and fraudulent manner, without the knowledge or consent of the owner, did fraudulently and barratrously, import from *Offend*, a quantity of smuggled goods, whereby the ship became forfeited, and was seized.—To this the defendant demurred, and insisted that, as the insurance only extended to losses which the ship might sustain in a lawful trade; the underwriter could not be liable for any loss occasioned by an unlawful trade, whether it proceeded from the act of the master or owner; and that the barratry insured against was such as might happen in a lawful trade, as by deserting, sinking, or running away with, the ship.—But the court determined that if the owner conducted himself with

with propriety, he was entitled to be indemnified against all the perils insured against in the policy; and that the words "*any lawful trade*" in the policy, meant the trade in which the ship was employed *by the owners*.

Every loss must appear to be a direct and immediate consequence of the cause to which it is ascribed by the insured. We have seen, however, in the case of *Vallejo v. Wheeler* (a), that whether the loss happen during the act of barratry, or after it, is immaterial. Yet, the following case will shew, that, if a loss do not happen within the time prescribed by the policy for the duration of the risk, the insurer will not be liable for it, though it be the undoubted consequence of the act of barratry.

A ship was insured from *Hamburgh* to *London*; and it appeared that, in the course of the voyage, the master committed barratry, by smuggling on his own account, on the *English* coast; that on the 1st of *September* 1785 the ship arrived at her moorings in the *Thames*, where she remained in safety till the 27th, when she was seized for the smuggling above stated, and the owners, upon their petition, had leave to compound for a sum of money.— Upon this case it was determined that though, by the excise laws, the forfeiture attaches the moment the offence is committed, and the ship may be seized at any time afterwards, and that the barratry was committed *during the voyage*; yet, that the underwriters were not liable for this loss; for the law of insurance would be left unsettled, if the liability of the insurers were to be continued for any other time than that prescribed by the policy.

The offence of barratry so mischievous in itself, and so injurious to commerce, is punishable as a public offence, according to the degree of guilt of the offender, by every commercial state in *Europe*.

In *France*, any fraud practised by the master or mariners, with or without the privity of the owners, and frauds committed by the owners themselves, are, as we have already seen, accounted barratry, and are punished with exemplary severity. It appears by the case of *Nutt*

The insurer will not be liable unless the loss happen during the voyage, though the barratry was committed before the voyage ended.

Lockyer v. Offley,
1 T. R. 252;
Sup. 174.

How barratry shall be punished

in *France*.

(a) Sup. 454.

v. *Bourdieu* (a), that the captain of a ship was sentenced to the galleys for life for signing false bills of lading, in order to change the voyage and carry away the goods: And the owner, who was convicted of being an accomplice in this crime, and of robbery in causing the ship to be carried to a wrong port, and converting the goods on board to his own use, was sentenced to the galleys for five years.

How offences of this nature are punished by the laws of this country, will be shewn by the last section of the present chapter.

Sect. 7.

Of Loss by average Contributions.

THE subject of average is a branch of marine law which does not properly make a part of the law of marine insurances. But as insurers, by the general words of most policies, are liable to indemnify the insured against those contributions which are denominated *general average*, the subject of average must often incidentally occur in the consideration of partial losses; it will therefore be necessary, in this place, to take a cursory view of this subject, and of the regulations by which averages are generally understood to be governed.

Average what. Average (b) is a term used in commerce to signify a contribution made by the owners of the ship, freight, and goods on board, in proportion to their respective interests, towards any particular loss or expence sustained for the general safety of the ship and cargo; so as that the particular loser may not be a greater sufferer than the owners of the ship and the other owners of goods on board. Thus, where the goods of a particular merchant are thrown overboard in a storm to save the ship from sinking, which

In what cases average contributions become payable.

(a) 1 T. R. 323, sup. 450.—(b) Average is derived from the latin word *averagium*, which comes from the verb *averare* to carry, and originally signified a service which the tenant owed to his lord, by horse or carriage. It is said to have been introduced into commerce to shew the proportion and allotment to be paid by every man according to his goods carried. *Cowel.*

may

may be lawfully done (a); or where the masts, cables, anchors, or other furniture of the ship are cut away or destroyed, for the preservation of the whole (b); or money or goods are given as a composition to pirates to save the rest; or damage is sustained in defending the ship against an enemy or pirate; or a ransom, (when that is legal), is agreed to be paid to an enemy or pirate for liberating the ship; or an expence is incurred for physic and attendance in curing the officers or seamen wounded in defence of the ship; or in reclaiming the ship, or defending a suit in a foreign court of admiralty, and obtaining her discharge from an unjust capture or detention. In these, and the like cases, where any loss is sustained, or any expence fairly and *bonâ fide* incurred, to prevent a total loss, such loss is the proper subject of a general contribution, and ought to be rateably borne by the owners of the ship, freight, and cargo on board, so that the loss may fall equally on all. This just and equitable contribution is called general or gross average, the regulations of which are found in almost every system of marine law (c). *Omnium contributione farciatur, quod pro omnibus datum est.—Æquissimum enim est, commune detrimentum fieri eorum qui propter amissas res aliorum, consecuti sunt ut merces suas salvas habuerunt (d).*

This is the original and proper meaning of average. When understood in this sense, it is called *general*, or *gross* average, because it falls generally upon the whole or

General average.

(a) 12 Co. 63, *Mouffe's case*.—(b) Si arbor vel aliud navis instrumentum, removendi communis periculi causa dejectum est, contributio debetur. ff. Leg. Rhod. L. 3. de jact. Vid. *Molloy*, b. 2, c. 2, § 6. But if the loss of the masts, anchors, sails, &c. be occasioned by mere stress of weather, this is not a general average, but the loss falls on the owner. *Le Guidon*, ch. 5, art. 20.—(c) Vid. Mo. 297. *Shew. Ca. parl.* 19. *Beaumes lex merc.* 148, 1 *Mag.* 64, 2 *Mag.* 96, 183, *Molloy*, b. 2, c. 2, § 6, 12, ff. Leg. Rhod. art. 9. *Laws of Wisb.* art. 20. *Laws of Ol.* art 8. See also the ordinances of the different commercial states, as collected by *Magens*.—(d) ff. Leg. Rhod. L. 1. de jact.

gross

Particular average.

gross amount of the ship, freight, and cargo, and also to distinguish it from what is often, though improperly termed *particular average*, but which, in truth, means a particular, and not a general loss, and has no affinity to average properly so called.

Petty average.

Such petty averages as are the usual charges of the voyage are not a charge on the insurers.

Otherwise if they have been occasioned by stress of weather, &c.

Average contributions can only be claimed where the sacrifice was absolutely necessary.

And where it appears to have conduced to the preservation of the ship.

Beside these, there are other small charges called *petty* or *accustomed* averages. Such as pilotage, towage, light-money, beaconage, anchorage, bridge-toll, quarantine, river-charges, signals, instructions, castle-money, pier-money, digging the ship out of the ice, &c. When these petty charges are incurred in the usual course of the voyage, they are not considered as a *loss* within the meaning of the policy, but only a *necessary and ordinary* expense: But if incurred for any extraordinary purpose in the voyage, as to provide against any impending danger, or in consequence of the ship's being driven out of her course by stress of weather; they will then be deemed gross or general average, for which the insurer will be liable (a).

A contribution upon a general average can only be claimed in cases where, upon as much deliberation and consultation between the captain and officers as the occasion will admit of, it appears that the sacrifice, at the time it was made, was absolutely and indispensably necessary for the preservation of the ship and cargo. Some have even gone farther, and have said, that the saving of the ship and cargo must *appear* to have been in fact owing to such sacrifice (b). But this, besides being in most cases incapable of proof, is quite unreasonable and unjust.

A loss which does not evidently conduce to the preservation of the ship and cargo, is not a proper ground for an average contribution: As if a pirate, having made himself master of a ship and cargo, take only the goods of a particular person (c); or if some particular goods be

(a) Vid. 1 Mag. 72. 2 Mag. 278.—(b) Beawes 148.—
(c) Mal. lex merc, 109.

damaged in a storm; in such cases the rest shall not be contributory (a). So, if upon the apprehension of an enemy, some goods are landed and secured on shore, and the rest taken; the owner of the goods taken shall not have average of the goods saved; for the salvage of these is not the cause of the taking of the rest; neither was the taking of those the cause of the salvage of the goods saved (b).

So, it must appear that the ship and the rest of the cargo were in fact saved: For if goods be thrown overboard in a storm, and the ship afterwards perish in the same storm there shall be no contribution of the goods saved, if any; because the object for which the goods were thrown overboard was not attained. But if the ship be preserved by the *jettison*, or throwing goods overboard, and continue her course, but is afterwards lost; the effects saved from this last misfortune, if any, shall contribute to the loss sustained by the *jettison*; because to that their preservation was once owing (c).

And where the ship and the rest of the cargo were in fact saved.

Upon the same principle, if a ship, upon her arrival at the mouth of a river or harbour, be found too deeply laden to get over a bar, or to sail up, and the captain, to lighten her, put part of the cargo into lighters, and these lighters are lost; the owners of the ship and the remaining goods shall contribute to this loss; because the removal of part of the cargo from the ship into the lighters was for the general benefit. But should the ship be lost, and the lighters be saved; the owners of the goods preserved in the lighters shall not contribute to this loss, because the ship could not be said to have been lost for the preservation of the goods in the lighters, and because it is a general rule that a contribution is only due when the ship and the remaining cargo come safe to port (d).

If goods, put into lighters to enable a ship to get up a river, be lost, the rest shall contribute: But if the ship be lost, the goods in the lighters shall not contribute.

(a) R. Mo. 297.—(b) R. Show. Ca. Parl. 20.—(c) 2 Mag. 96, 240. Ord. Louis XIV. tit. contrib. art. 15, 16. Semb. coast. 1 Mag. 56. Vid. Show. Ca. Parl. 20. Mo. 297.—(d) Vid. 1 Mag. 56. Malynes, 109, 110.

Whether the wages and expences of the crew during the detention of a ship unjustly captured be a general average.

Whether such charges, where a ship is forced to go into port to refit after a storm, be a general average.

If a ship be unjustly captured and carried into a foreign port, it is said that, not only the charge of reclaiming her, but also the wages and expences of the ship's company during the detention, shall be brought into a general average (a).

It is also said, that where a ship is forced to enter a port to repair the damage she has suffered in a storm, being unable to continue her voyage without apparent risk of being lost; that, in such case, the wages and provisions for the crew, from the day it was resolved to seek a port to refit the vessel, to the day of her departure from thence, with all the charges of unloading, re-loading, anchorage, pilotage, and every other expence incurred by this necessity, shall be brought into a general average (b).

Though this point has never yet been expressly decided in any *English* court of justice, yet the principle seems to have been acceded to at different times by judges of great authority.

Upon a policy on the ship, wages while the ship was under a repair, not occasioned by any extraordinary accident, cannot be recovered.

Lateward v. Curling, at N. P. after Trin. 1776. *Park* 125. But there may be exceptions to this rule.

Thus, where an action was brought upon a policy on a ship, to recover the amount of wages and provisions expended during the time she went from *Bengal* to *Bombay* to repair;—Lord *Mansfield*, as he frequently did afterwards on similar occasions, decided that, as the insurance was on the ship only, and the claim was for wages, the action could not be maintained. But he said, that there might be cases where exceptions to the general rule ought to be allowed; but that, in order to consider a case as *excepted*, it must appear that the expence was absolutely necessary, and occasioned by some of the perils mentioned in the policy.

If a ship be obliged to put into port to repair, the charges of unloading and re-loading the cargo, and the expences of the repair are a general average.

In the case of *Da Costa v. Newnham* (c), Mr. Justice *Buller* cites the above passage from *Beawes*, and though it was not necessary, he said, to determine that point then, he seemed disposed to concur in it. It was, however, determined in that case, that where a ship is obliged

(a) *Beawes*, 150, 1 *Mag.* 67. Vid. Ord. of *Louis XIV.*, tit *avaries*, art. 7.—(b) *Beawes* 150.—(c) 3 T. R. 407, post.

to put into port to repair, and this is necessary for the safety of the whole concern, the charges of unloading, re-loading, and taking care of the cargo, and also the wages and provisions of the workmen hired for the repair, become a general average. This decision comes very near, in principle, to the doctrine in *Beawes*: The only difference consists in this, that *Beawes* allows the wages and provisions of the seamen, during the interruption, to be brought into a general average: But in *Da Costa v. Newnham*, the crew were discharged at the place where the ship was repaired; and therefore it was not necessary to decide that point.

No injury occasioned by mere sea-damage can be the proper subject of general average. As if the ship be damaged in her hull or in her rigging, the goods on board shall not contribute for this. For the ship is like any instrument used by a workman in his trade. If, in doing his work, he breaks his hammer or his anvil, he can claim no satisfaction for this from his employer.

Every injury occasioned by mere sea-damage is only a particular average.

Si conservatis mercibus, deterior facta sit navis, aut quid exarmaverit, nulla facienda est collatio: Quia dissimilis earum rerum causa sit, quæ navis gratia parentur, et earum pro quibus mercedem aliquis acceperit. Nam et si faber incudem aut malleum frejerit; non imputaretur ei qui locaverit opus. Sed si voluntate vectorum, vel propter aliquem metum, id detrimentum factum sit; hoc ipsum sarciri oportet (a)'.

Upon the same principle if a ship spring a leak in a storm, by which goods on board are spoiled; this is a simple or particular average, or particular loss, and not the subject of an average contribution (b).

But in a late case, where the captain cut the ship's cable and made other sacrifices of the ship's tackle and furniture, to prevent her from being cast away in a storm; and also employed and paid a number of men to keep the ship, which had been damaged in the storm, free from water, in order that a cargo of corn which was then on board might

The owners of the ship may maintain an action against the owner of corn on board, to recover a contribution for sacrifices of the ship's tackle, and expenses incurred, to save the corn.

(a) Dig. l. 14, tit. 2, de leg. Rhod. de jact. § 1.—(b) *Consolato del mare*, ch. 63, vid. also ch. 193, 194. *Le Guidon*, ch. 5, art. 20. *Laws of Wisbuy*, art. 12. *Roccus de navib.* n. 59.

Birkley and others v. Presgrave, 1 East 220.

not be damaged; it was determined that this was a general average, and that the owner of the ship might maintain an action at law against the owner of the corn, to recover his contribution.

What things shall be liable to contribute to a general average.

As to the things on board which shall be liable to contribute to a general average, the rule seems to be,—that the ship, freight, and every thing remaining on board that can properly be deemed a part of the cargo, shall be subject to this charge; and therefore money, plate, and even jewels, though their *weight* could not have increased the danger of the ship, must contribute according to their value; because the sacrifice was as necessary for their preservation, as for that of any thing else on board (*a*). But the persons on board, their wearing apparel, the jewels or ornaments belonging to their persons, shall not contribute (*b*). Neither are seamen's wages liable to contribute (*c*). If it were otherwise, seamen might sometimes be tempted to resist when a sacrifice is necessary for the general safety.

What not.

It is the captain's duty, on his arrival in port, to settle the contribution.

If the ship escape the dangers which made the sacrifice necessary, and arrive at her port of destination, the captain regularly should make his protests; and he, with some of the crew (*d*), must swear that the goods were thrown overboard, money paid, or other loss sustained, for the safety of the ship and goods, and for the preservation of the lives of those on board, and for no other cause (*e*). The average, if not settled before, should then be adjusted, and it should be paid before the cargo is landed; for the owners of the ship have a *lien* on the goods on board; not only for the freight, but also to answer all averages and contributions that may be due (*f*).

Remedy against the captain for neglecting to adjust the average, or to collect it.

Should this be neglected, the particular sufferer is not without remedy. As it is the duty of the captain

(*a*) 1 *Mag.* 62, *Molloy*, tit. Aver. § 4. Per *Buller, J.* in *Peters v. Milligan*, at N. P. after M. 1787.—(*b*) *Vid. Molloy*, l. 2, c. 6, § 4, *Leg. Rhod.* § 2, art. 8. *Leg. Oler.* art. 8. *Leg. Wisb.* art. 20. As to freight, *vid. 2 T. R.* 407.—(*c*) 1 *Mag.* 71.—(*d*) *Mal. lex merc.* 113, says, *with most part of his company*.—(*e*) *Beaumes* 143. *Molloy*, l. 2, c. 6, § 2. *Mal. L. M.* 113.—(*f*) *Mal. L. M.* 113.

to detain the goods on board till the contribution be made, an action would, I conceive, lie against him, or against the owners, for a neglect of that duty. If the loss was in money paid, an action on the case for money paid, would unquestionably lie against each person bound to contribute for his share: If in goods, a special action on the case founded on the custom of trade would lie against each person liable to contribute (a), or a bill in equity might be filed against them all.

The mode of ascertaining the amount of each person's contribution, is not very accurately defined in our law. —It is usually done, upon the ship's arrival at her port of discharge, by ascertaining the neat value of the ship, freight, and cargo, as if nothing had been lost, but all had arrived safe (b). These are to be valued at the price they would fetch in ready money at the port of discharge; and the neat amount, after deducting all charges, is the sum which is subject to the contribution (c). And each person's share of the loss will bear the same proportion to the value of his property, as the whole loss bears to the aggregate value of the ship, freight, and cargo.

How the amount of each person's share of the contribution shall be settled.

Different foreign states have established a variety of positive regulations, as to the *degree* in which the ship shall be liable to contribute. Some, as in *England*, make the ship contribute for her full value and the freight (d); others, for half her value, and one third of the freight; others again, for half the value of ship and freight.

In what degree the ship shall be liable.

In *England* the ship contributes for her full value and freight.

In *England*, the ship is valued at the price she was worth on her arrival at her port of delivery; and almost all foreign states follow the same rule (e). The value of the freight is the clear sum which the ship has earned after seamen's wages, pilotage, and all such other petty charges as come under the denomination of *petty averages*,

And she shall be valued at the price she was worth on her arrival at her port of delivery. And the freight is valued at the sum the ship has earned on her arrival there.

(a) *Mo.* 297, *Show. Ca. Parl.* 19, *R. Birkley v. Presgrave*, 1 *East* 220, *sup.* 465.—(b) It is necessary to take the goods lost into this account, otherwise the owner of them would be the only person who would not be a loser.—(c) *Vid.* 1 *Mag.* 69, *Molloy*, tit. *Aver.* § 15.—(d) *Königsberg, Hamburgh, and Copenhagen.* *Vid.* 2 *Mag.* 207, 237, 339.—(e) 2 *Mag.* *ut sup.*

are deducted; of which the cargo bears two thirds, and the ship the remaining third.

How the jettison shall be valued.

As to the mode of valuing the jettison, the rule of the Roman law is, '*Portio autem pro aestimatione rerum quæ salva sunt, et earum quæ amissa sunt, præstari solet. Nec ad rem pertinet, si hæ, quæ amissa sunt, pluris venire poterunt; quoniam detrimenti, non lucri, sit præstatio. Sed in his rebus, quarum nomine conferendum est, aestimatio debeat haberi, non quanti emptæ sint, sed quanti venire possunt* (a). In England it was formerly the custom to value goods at *prime cost*, if the loss happened before half the voyage was performed; but if after, then at the price they would have borne at the port of delivery (b). But that distinction is exploded, and it is now the settled practice with us, to estimate the goods lost at the price they would have fetched at the port of delivery, on the ship's arrival there, freight, duties, and other charges being deducted (c).

Under the general words of the policy, the insurer is bound to pay all average contributions.

These contributions, under the general words of the policy, are a charge which the insurer is bound to pay; and it makes no difference whether the insured pay towards, or receive, them: He ought, in either case, to bear his proportion of the general loss, and that must fall on the insurer. The doctrine of *Roccus* is, '*factu facto, ob maris tempestatem, pro sublevanda navi, an tenentur affecuratores ad solvendum aestimationem rerum jactarum domino ipsarum? Dic eos non teneri, quia pro rebus jactis fit contributio, inter omnes merces habentes in illa navi pro solvendo pretio domino ipsarum, et ideo si affecuratus recuperat pretium rerum jactarum, non potest agere contra affecuratores; tamen tenentur affecuratores ad reficiendum illam ratam et portionem, quam solvit affecuratus in illam contributionem faciendo inter omnes, habentes merces in illa navi, quæ portio cum non recuperetur ab aliis, habetur pro deperdita, et proinde ad illam portionem tenentur affecuratores* (d).'

(a) *Dig. lib. 14, tit. 2, De lege Rhod. de jactu*, § 4.—
(b) *Mal. Lex Merc. 113.*—(c) *Molloy, tit. Aver. § 15. Vid. 2. Mag. 100, 285, 339.*—(d) *Roccus, h. t. n. 62.*

SECT. 8.

Of Loss by the Expence of Salvage.

AS the expence of salvage, like average contributions, is a charge for which the insurer is liable, within the meaning of most policies (*a*), the subject of salvage must, like that of average, sometimes incidentally occur in the consideration of partial losses; and therefore it will be proper, under this head, to enquire in what cases, and to what amount, salvage shall be a charge upon the insurer.

Salvage originally meant the thing or goods saved from shipwreck or other loss; and in that sense it is generally to be understood in our old books. But it is at present more generally understood to mean the allowance made to those by whose means the ship or goods have been saved from the effects of shipwreck, fire, pirates, enemies, or any other loss or misfortune. At common law, the party who has saved the goods of another from loss or any imminent peril, has a *lien* on the goods, and may retain them in his possession till payment of a reasonable salvage, like that which a taylor, an inn-keeper, or a common carrier, has upon the clothes, the horses, or the goods of his customer (*b*).

Salvage what.

At common law the party has a *lien* on the thing saved, till payment of salvage.

Every maritime state has certain regulations to ascertain in what cases, and to what amount, salvage shall be paid. To attempt to give an account of all such regulations, in foreign countries, would be more a work of curiosity than of utility.—It will be sufficient for our present purpose, to state shortly the regulations which

How the expence of salvage is regulated in England.

(*a*) The policy, in case of loss or misfortune, authorizes the insured to sue and labour for the recovery of the thing insured, to the charges whereof the insurers engage to contribute.—

(*b*) Per Holt, C. J. in *Hartfort v. Jones*, 1 Lord Ray. 393; 2 Salk. 654; Vid. *Emerig.* tom. 2, p. 202. *Pothier*, h. t. n. 134.

the law of *England* has established on this subject, and which will be principally found in our statutes; some of which are of very antient date (a). But the regulations which are now principally in force, are found in the stat. 12 An. stat. 2. c. 18: and subsequent acts, made for the protection of ships and goods stranded on the coasts of this kingdom.

By 12 An. stat. 2. c. 18, § 2. Persons employed in the salvage of ships, &c. shall within 30 days be paid a reasonable reward.

How this shall be secured to them.

If the parties disagree about the *quantum*, three neighbouring justices shall adjust it.

How the goods saved shall be disposed of, if no owner appear.

That statute, after directing the means to be employed for the preservation of ships in distress, enacts, (§ 2.) 'That, all persons who shall be employed in preserving ships or vessels in distress, or their cargoes, shall, within 30 days after the service performed, be paid a *reasonable reward* for the same, by the commander or other superior officer, mariners, or owners of the ship or goods so saved; and in default thereof, the ship, vessel, or goods so saved shall remain in custody of the collector of the customs or his deputy, until all charges shall be paid, and until all persons so employed shall be reasonably gratified for their trouble; or good security given, to the satisfaction of the several parties that are to receive the same. And in case the commander or other superior officer, mariners, or owners, of the ship or goods so saved, shall disagree with the said officer of the customs, touching the money deserved by the persons so employed, the commander of the ship saved, or the owner of the goods therein, and the said officer of the customs may nominate three neighbouring justices, who shall adjust the *quantum* of the gratuity to be paid to the several persons acting in the salvage of the ship or goods; and such adjustment shall be binding to all parties, and shall be recoverable in an action at law to be brought by the respective persons to whom the same shall be allotted by the justices. And in case no person shall appear to make his claim to all or any of the goods saved, then the chief officer of the customs of the nearest port, shall apply to three of the nearest justices, who shall put him or

(a) 3 Ed. I. c. 4; 4 Ed. I. c. 2; 27 Ed. III. c. 13.

‘ some responsible person in possession of such goods,
 ‘ such justices taking an account thereof in writing, to
 ‘ be signed by such officers of the customs; and if the
 ‘ goods shall not be legally claimed within 12 months,
 ‘ by the right owners, they shall be publickly sold, or
 ‘ if perishable forthwith sold, and the produce of the
 ‘ sale, after all charges deducted, with a fair account of
 ‘ the whole, shall be transmitted to the *Exchequer*, there
 ‘ to remain for the benefit of the owner, when appear-
 ‘ ing; who, upon affidavit, or other proof of his right,
 ‘ to the satisfaction of one of the barons of the coin,
 ‘ shall, upon his order, receive the same out of the
 ‘ *Exchequer*.

This statute also prescribes the punishment to be inflicted on persons guilty of plundering or destroying ships in distress. But this being found insufficient to repress these barbarous practices, the stat. 26 G. II, c. 19, has enacted a variety of further regulations for the more effectual punishment of offenders and the better protection of ships in distress.

On the subject of salvage, the 5th section of this act provides, that, ‘ In case any person, not employed in the
 ‘ salvage of the ship or goods, shall, in the absence of
 ‘ the persons so employed and authorized, save any such
 ‘ ship or goods, and cause the same to be carried, for
 ‘ the benefit of the owners, into port, or to any near ad-
 ‘ joining custom-house, or other place of safe custody,
 ‘ immediately giving notice thereof to some magistrate
 ‘ or custom-house, or excise-officer; or shall discover to
 ‘ such magistrate or officer where such goods are wrong-
 ‘ fully bought, sold, or concealed, then such person shall
 ‘ be entitled to a reasonable reward for such services;
 ‘ to be paid by the master or owners of such vessels or
 ‘ goods; and to be adjusted in case of disagreement
 ‘ about the *quantum*, in like manner as the salvage
 ‘ is to be adjusted and paid by virtue of the stat.
 ‘ 12 An.’

By 26 G. II, c. 19, § 5. Persons, though not employed in the salvage, who shall save any ship or goods, or give notice of any goods unlawfully bought, sold, or concealed, shall be intitled to salvage.

And by § 6, ‘ For the better ascertaining the salvage
 ‘ to be paid in pursuance of this and the former act,

By § 6. The nearest magistrate, collector of the customs,

or chief constable shall call a meeting of the sheriff, magistrates, &c. five of whom may employ persons for saving ships, &c.

And examine persons on oath, &c. to adjust the quantum of salvage.

Such magistrate, &c. to have 4s. a day.

By § 7, if the salvage be not paid, or security given within 40 days, the officer of the customs shall raise money by bill of sale of the ship or goods saved, redeemable on payment of principal and 4 per cent. interest.

the justice, mayor, bailiff, collector of the customs, or chief constable, who shall be nearest to the place where the ship or goods shall be stranded, shall forthwith give publick notice for a meeting, to be held as soon as possible, of the sheriff, or his deputy, the justices, mayors, or other chief magistrates of towns, coroners, or commissioners of the land tax, or any five or more of them, who are required to give aid in the execution of this and the former act, and to employ proper persons for the saving of ships in distress, and such ships and effects as shall be stranded or cast away; and also to examine persons on oath touching the same, or the salvage thereof, and to adjust the quantum of such salvage, and distribute the same among the persons concerned in such salvage, in case of disagreement among the parties, or the said persons; and that every such magistrate, &c. attending and acting at such meeting, shall be paid four shillings a day for his expences, out of the goods saved by their care or direction.—Provided (§ 7.) that if the charges and rewards for salvage, directed to be paid by this and the former act, shall not be fully paid, or sufficient security given for the same within 40 days after the services performed, the officer of the customs concerned in such salvage shall borrow or raise so much money as shall be sufficient to pay such charges, or any part thereof remaining unpaid, or not secured as aforesaid, by or upon one or more bill or bills of sale under his hand and seal, of the ship or vessel, or cargo saved, or such part thereof as shall be sufficient, redeemable on payment of the principal sum borrowed, and interest at 4 per cent. per annum.

There are many other regulations in this act, as to the persons by whom this and the former act shall be put in force, and as to the detection and punishment of offenders. The foregoing extracts which have been made for the purpose of shewing that, by our law, the salvage of ships or goods stranded or cast away is a reasonable satisfaction to the persons employed in saving and protecting them for their labour; to be estimated, not according

according to their own arbitrary will, but by persons of the first respectability in and near the place where the misfortune happens.

With respect to salvage in the case of recapture by the marine law of *England*, as practised in our courts of admiralty previous to any parliamentary regulations, if the ship or goods were retaken before condemnation, till which time the *jus postliminii* continued, the original owner was entitled to have restitution decreed to him, on payment of a *reasonable salvage* to the recaptors. But by several statutes (a), salvage upon a recapture was fixed at certain rates, according to the length of time the recaptured ship was in the hands of the enemy. It will be sufficient, however, for our present purpose, to state the regulations now in force as they were established by the last prize act.

How salvage upon a recapture was regulated by the marine law.

By stat. 33 G. III, c. 66, § 42. 'If any ship or vessel, taken as prize, or any goods therein, shall appear, in the court of admiralty, to have belonged to any of his Majesty's subjects, which were before taken by any of his Majesty's enemies, and at any time afterwards retaken by any of his Majesty's ships, or any privateer, or other ship or vessel under his Majesty's protection; such ships, vessels, and goods shall, in all cases, (save as hereafter excepted), be adjudged to be restored, and shall be accordingly restored, to such former owner or owners, he or they paying for salvage, if retaken by any of his Majesty's ships, one eighth part of the true value thereof, to the flag officers, captains, &c. to be divided as the same act directs: And if retaken by any privateer, or other ship or vessel, one sixth part of the true value of such ships and goods, to be paid to the owners, officers and seamen of such privateer or other vessel, without any deduction. And if retaken by the joint operation of one or more of his Majesty's ships, and one or more private ships of war, the judge of the court of admi-

By 33 G. III, c. 66, ships, &c. at any time recaptured, shall pay, if retaken by men of war, one eighth, if by privateers, one sixth, for salvage.

If retaken by both jointly, the judge of the admiralty shall order such salvage, and in such proportions, as he shall deem fit.

(a) Vid. 13 G. II, c. 4, and 29 G. II, c. 34.

But if the recaptured ship be set forth by the enemy as a *ship of war*, she shall be lawful prize to the recaptors.

‘ralty, or other court having cognizance thereof, shall order such salvage, and in such proportions, to be paid to the recaptors, by the owners, as he shall, under the circumstances of the case deem fit and reasonable (a). But if such recaptured ship or vessel shall appear to have been set forth, by the enemy, as a ship or vessel of war, the said ship or vessel shall not be restored to the former owners; but shall, in all cases, whether retaken by any of his Majesty’s ships, or by any privateer, be adjudged lawful prize for the benefit of the captors.”

The insured need not declare for salvage, but may recover under a declaration for the loss which occasioned it, and for the damage the goods saved have sustained.

As the insurer does not, in express words, undertake to pay salvage, perhaps the insured could not declare for a loss *by the payment of salvage*. That form of declaring might, perhaps, be thought too general. Indeed it would be useless to declare so, for he may declare as for that species of loss which occasioned the payment of salvage, and recover the salvage actually paid (b). And upon the same declaration he may recover for the loss, if any, sustained by damage done to the goods saved.

The court of admiralty regulates the rate of salvage in the case of recaptured neutrals.

These regulations relate only to the salvage of *British* ships recaptured. In the case of neutral ships captured by the enemy, and retaken by *British* men of war or privateers, the court of admiralty have a discretionary power of allowing such salvage, and in such proportions, as, under the circumstances of each particular case, may appear just. But there is no positive law, or binding regulation, to which parties may appeal to regulate the rate of such salvage. Some salvage in such cases is generally allowed; and in practice the rate is usually regulated by the same rules as in the case of *British* property.

(a) It seems a little singular that, in the case of a joint capture by men of war and privateers, the judge of the court of admiralty has power to order, not only the proportion of the salvage which each shall receive, but also to ascertain the amount of the salvage which the owners shall pay to the recaptors.—
(b) *R. Cary v. King*, Ca. Temp. *Hard.* 304. Vid. inf. ch. 17, § 2.

Before an action will lie for a loss by payment of salvage, the amount of such salvage must have been ascertained by the decision of the court of admiralty, which alone has jurisdiction to determine as to the right to salvage in all cases, and, in the case of the recapture of neutrals, as to the amount of such salvage.

Salvage must be paid under an adjudication of the court of admiralty, to entitle the insured to claim it from the underwriters.

When the salvage, however, is very high, the insured may abandon, and call upon the insurer as for a total loss, as we shall have occasion more particularly to observe hereafter, in the chapter upon abandonment.

Sect. 9.

Of Wilful and Fraudulent Losses.

AT the conclusion of the sixth section of the present chapter (a) we shortly adverted to the punishment of bar-
ratre by the laws of other countries. We will in the present section shew how piracy and other offences of this nature, and also the offence of procuring wilful and fraudulent losses, with intent to defraud insurers, are punishable by the law of *England*.

The crime of piracy, or robbery upon the high seas, is an offence against the universal law of society; a pirate being, as Lord Coke describes him, *hostis humani generis*. By the ancient common law, piracy, if committed by a *subject*, was held to be a species of treason, being contrary to his natural allegiance; and by an *alien*, to felony only: But now, since the statute of treasons, 25 *Ed. III.* c. 2, it is holden to be only felony in a *subject* (b). Formerly this offence was only cognizable by the admiralty courts, which proceed by the rules of the civil law (c). But it being inconsistent with the liberties of the nation, that any man's life should be taken away,

How piracy is punished by the law of *England*.

(a) Sup. 459.—(b) 3 Inst. 113.—(c) 1 Hawk. P. C. 98.

unless by the judgment of his peers, the stat. 28 H. VIII, c. 15, established a new jurisdiction for this purpose, which proceeds according to the course of the common law (a).

The offence of piracy, by the common law, consists in the committing of those acts of robbery and depredation upon the high seas, which, if committed upon land, would amount to felony there (b). But by stat. 11 and 12 W. III, c. 7, § 8 and 9. 'If any natural born subject commit any act of hostility upon the high seas, against others of his Majesty's subjects, under colour of a commission from any foreign power; or if any commander or mariner shall betray his trust, and run away with any ship, boat, ordnance, ammunition or goods; or yield them up voluntarily to any pirate; or bring any seducing message from any pirate, enemy, or rebel; or consult, combine, or confederate with, or attempt to corrupt, any officer or mariners to yield up, or run away with, any ship or goods, or turn pirate; or shall lay violent hands on his commander, to hinder him from fighting in defence of his ship; or shall confine him, or make, or endeavour to make, any revolt in the ship, shall be adjudged to be a pirate, felon, and robber, and shall suffer death and loss of lands, as a pirate, felon and robber on the sea ought to suffer, whether he be principal, or merely accessory by setting forth such pirates, or abetting them before the fact, or receiving or concealing them or their goods, after it:'. And the stat. 4 G. I, c. 11, expressly excludes the principals from the benefit of clergy. By the stat. 8 G. I, c. 24, trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose; or confederating or corresponding with them, or forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing

(a) Vid. 4 Bl. Com. 71.—(b) 1 Hawk. P. C. 100.

any of the goods overboard, shall be deemed piracy; and such accessories to piracy as are described in the above stat. 11 and 12 *W. III.*, are declared to be principal pirates, and all pirates convicted by virtue of this act, are made felons without benefit of clergy. Thus does the statute law of *England* aid and enforce the law of nations, as a part of the common law, by inflicting an adequate punishment upon offences against that universal law.

The stat. 1 *An. st.* 2, c. 9, § 4 and 5, makes it a simple felony in any master or mariner, wilfully to cast away, burn, or destroy any ship to which he belongs, to the prejudice of the owner, or of any merchant who shall load goods thereon; and takes away the benefit of clergy from such offences, committed on the high seas.

The 1 An. st. 2, c. 9, makes it felony to destroy any ship, to the prejudice of the owners of the ship or goods on board; and takes away clergy, if committed at sea.

Though the insurers are only answerable for losses arising from the accidents and misfortunes incident to maritime adventures, and not for such as proceed from contrivance or design on the part of the insured; yet the temptation to defraud insurers by the wilful and concerted destruction of ships and goods insured, in order to give a colour to fraudulent claims for pretended losses, has been found productive of so many evils, that it became necessary for the legislature to interpose its authority to restrain them: And therefore, by stat. 4 *G. I.* c. 12, § 3, 'If any owner, captain, master, mariner, or other officer of any ship, shall wilfully cast away, burn, or otherwise destroy the ship, of which he is owner, or to which he belongs; or in any manner direct or procure the same to be done, to the prejudice of the person or persons that shall underwrite any policy of insurance thereon; or of any merchant that shall load goods thereon, shall suffer death.'

The 4 G. I. c. 12, extends this to the case of the owner or master who shall destroy any ship to the prejudice of the owners of, or underwriters upon goods.

This statute having only made this crime a simple felony, it was found insufficient to restrain the commission of it, and therefore the stat. 11 *G. I.* c. 29, § 6 and

The 11 G. I. c. 29, takes away clergy from such offenders in all cases,

7, takes

7, takes away from it the benefit of clergy, and inflicts the same punishment on persons guilty of the like offences, '*with intent to prejudice any owner of such ship:*' And it further enacts that if such offences be committed within the body of any county, they shall be tried in the same manner as other felonies; if on the high seas, then according to the directions of the stat. 28 H. 8, c. 15.

C H A P. XIV.

*Of Abandonment.**Preliminary Observations.*

IT has already been observed (a) that the term *total loss* does not only signify the absolute destruction of the thing insured, according to its natural import; but also that, in legal and commercial language, it means such a loss or damage to the thing insured, though it specifically remain, as renders it of little or no value to the owner. It also means any loss or misfortune whereby the voyage is lost, or become not worth pursuing, and the projected adventure frustrated. In such cases the insured is entitled to call upon the insurer as for a total loss: But then he must *abandon*; that is, he must renounce and yield up to the insurer all his right, title, and claim to what may be saved, and leave it to him to make the most of it for his own benefit. The insurer then stands in the place of the insured, and becomes legally entitled to all that can be rescued from destruction (b). The idea of abandonment therefore, pre-supposes a total loss in this latter sense, and implies that something remains which may be saved, and which may be given up, or abandoned, to the insurers. For if the insured could only abandon, in the case of a total loss, in the strict and natural sense of the words, there would be nothing to abandon, and abandonment could then be only an useless form.

Nature of abandonment.

It has been said that the practice of abandoning dates its origin from the period when the contract of insurance itself first came into use (c); and yet it does not seem to be a right which necessarily results from the nature

Whether coeval with insurance itself.

(a) Sup. 474.—(b) Vid. *Pothier*, h. t. n. 133. Ord. Louis XIV, h. t. art. 47. Ord. *Bilboa*, art. 32. 1 *Vez*. 98.
(c) *Park* 143.

of the contract.—That the loss or damage should be made good by the insurer, who has made himself responsible, is perfectly reasonable, and conformable to the spirit of the contract. But it does not necessarily follow from thence, that, in case of a disaster, he should be *forced* to become the proprietor of the ship or goods insured, merely because he was a surety for their safe arrival; indeed the author of *Le Guidon* says, that abandonment is only to be resorted to in extreme cases (*a*).

Its probable
origin.

It seems more probable that abandonment arose from the practice of occasionally introducing into policies particular stipulations, that if the thing insured should be spoiled or greatly damaged by any of the perils insured against, it should be abandoned to the insurers, who should be thereupon obliged to pay the entire sum insured; and that simply making good the damage should not be sufficient to discharge them; and stipulations like this, being frequently introduced into the contract, became at length the foundation of general rules, which have been established by positive law in some countries, and adopted in others as part of the general law of insurance.

Whether it has
been carried too
far.

Be this as it may, it has been thought that in many instances the practice of abandoning has been carried too far: and that the insured should, in no case, be permitted to abandon, where the effects insured, or the greatest part of them, still exist, and are in the power of the insured. Mr. Justice *Buller* seems to have been of opinion, that when this question first came before our courts, it would have been the wisest policy to have determined that the owners should in no case be allowed to abandon, where the property still existed (*b*). The first case we find in our books on the right of abandonment, came before Lord *Hardwicke* in the court of Chancery in the year 1744; and he, after some deliberation, determined that where a recaptured ship and cargo were sold to pay the salvage, the insured had a right to abandon the surplus, and claim as for a total loss (*c*).

(*a*) *Le Guidon*, c. 7, art. 1.—(*b*) *Vid.* 1 T. R. 615, 616.
—(*c*) *Vid. Pringle v. Hartley*, 3 Atk. 195, inf. 495.

It must be admitted, that the privilege of abandoning in every case which is deemed a total loss may sometimes be liable to great abuse. Where, as in the case of capture, the thing insured, and every part of it, is completely gone out of the power of the insured, it is just and proper that he should recover at once as for a total loss, and leave the *spes recuperandi* to the insurer who will have the benefit of a recapture, or of any other accident by which the thing may be recovered. But it seems, at first sight, impolitic, not to say unreasonable, that the owner of a ship which is stranded, (the captain and crew being his servants, on the spot, and in possession of the ship and cargo), should be at liberty to abandon these to a number of underwriters who sometimes find it difficult to act in concert, and who have, perhaps, no means of disposing of the property thus thrown upon their hands, but to the greatest disadvantage.

On the other hand, it may be truly said that the captain must occasionally be the agent, not only of the owners or freighters of the ship, but also of every person interested either in the ship or cargo; that he, in case of misfortune, is bound to do the best in his power for the benefit of all concerned; and that, whether he disposes of what is saved for account of the insured, or the insurer, comes to the same thing, since in both cases the amount must go in diminution of a total loss. Perhaps, too, the notice of abandonment, which may, in some cases, enable the underwriters to superintend the disposal of what may be saved, may sometimes be productive of very beneficial effects, in preventing frauds.

In treating this subject we will consider,

1. In what cases the insured may abandon;
2. Within what time this must be;
3. The form of the abandonment;
4. The effect of it;
5. Of the ordering and disposal of the effects abandoned.

SECT. I.

In what cases the insured may abandon.

The general principle upon which the right of abandoning rests.

IN general it may be laid down that, by the law of insurance, as understood in *England*, the insured may abandon in every case where, by the happening of any of the misfortunes or perils insured against, the voyage is lost, or not worth pursuing, and the projected adventure is frustrated; or where the thing insured is so damaged and spoiled as to be of little or no value to the owner; or where the salvage is very high; or where what is saved is of less value than the freight; or where further expence is necessary, and the insurer will not undertake, at all events, to pay that expence, &c. (a).

In what cases it is permitted in France.

The ordinance of the marine of *Louis XIV.* (b) which in this, as in most other particulars, is collected from the same ancient sources from whence other countries have drawn their principles of the law of insurance, confines abandonment to these five cases; capture, shipwreck, stranding, arrest of princes, or the *entire loss of the effects insured* (c).

Valin thinks the latter words mean, not an absolute destruction, but a *general loss* (d).—*Pothier* says they mean a total, or *almost total*, loss (e). This he explains by saying, that goods which are considerably damaged are deemed to be goods lost; and therefore when all, or almost all the goods are in that state, it is a total loss. Both these authors cite *Le Guidon*, which lays it down that the insured may abandon when there is an average loss or damage which exceeds half the value of the goods insured,

(a) Per Lord Mansfield, in *Mills v. Fletcher*, inf. 497.—(b) h. t. art. 45.—(c) "*Perte entiere des effets assurés.*"—(d) "*Perte generique des effets assurés, sans être absolue.*" *Valin* sur art. 19, h. t. p. 61.—(e) "*Perte totale ou presque totale des effets assurés.*" *Pothier*, h. t. n. 319.

or in case they be so damaged as not to be worth the freight or little more (a).

Emerigon objects to both these interpretations, as being vague and uncertain, and as leaving it too much in the breast of the judge to decide what shall be an *entire*, or *almost entire*, loss, which, he says, must lead to great doubts and ruinous litigation (b).

By the *French* law, the right to abandon seems to depend on the *species of misfortune* which has happened; with us it depends rather on the *degree of loss* sustained in consequence of it.

Such are the general principles upon which the right of abandoning rests: We will now take a view of the cases in which those principles have been exemplified, *first*, upon losses by capture, and arrest of princes; and *secondly*, upon other losses.

1. *Of the right of abandoning, upon capture, and arrest of Princes.*

As capture and arrest of princes have afforded the most frequent occasions for abandonment, so most of the great leading principles upon which the right of abandoning rests, have been fully discussed and established in cases of that sort.

Capture by an enemy or a pirate, or an arrest of princes, or even an embargo, is *prima facie* a total loss; and immediately upon the capture, or upon a mere arrest, or at any time while the ship continues under detention, the insured may elect to abandon, and give notice to the insurer of his intention so to do; and thus entitle himself to claim as for a total loss from the insurer. For, from the moment of the capture, the owners lose their power over the ship and cargo, and are deprived of the free disposal of them; and, in the opinion of the merchant,

Capture or arrest of princes, is *prima facie*, a total loss.

(a) "Le marchand chargeur est en liberté de faire à ses assureurs de sa propriété qu'il a en la marchandise chargée, lors et quand il advient avarie qui excède ou endommage la moitié de la marchandise ou telle emprise en la marchandise qu'elle ne vaille le fret, ou peu de chose u'avantage." *Le Guidon*, ch. 7, art. 1.—(b) *Emerig.* tom. 2, p. 183.

his right of disposal being suspended or rendered uncertain, is equivalent to a total deprivation. It would therefore be unreasonable to oblige the insured to wait the event of capture, detention, or embargo (a).

Upon a wager policy the insured cannot abandon.

There is this difference between a policy *upon interest*, and a *wager policy*, that in the one case the insured may, if he think proper, abandon the moment he has notice of a capture or detention, and this will bind the underwriters, whatever may be the ultimate fate of the ship; but in the case of a wager policy there can be no abandonment, because the insured has nothing to abandon (b).

But a capture or arrest does not necessarily terminate in a total loss.

But a capture or arrest does not necessarily, and at all events, terminate in a total loss, so as to entitle the insured to abandon; for as he cannot abandon till he has received advice of the loss; if, at the time he receives such advice, or before he has elected to abandon, he receive advice that the ship or goods insured are recovered, or are in safety, he cannot then abandon; because he can only abandon *while* it is a total loss, and he knows it to be so; not after he knows of the recovery. Therefore, if a captured ship be retaken and permitted to proceed on her voyage, so that she suffers but a small temporary inconvenience; this would only be a partial, and not a total loss (c).

Neither does a recapture necessarily deprive the insured of the right to abandon.

On the other hand, a title to restitution upon a recapture does not necessarily, and at all events, deprive the insured of the right to abandon: For if, in consequence of the capture, the voyage be lost, or not worth pursuing; if the salvage be very high; if farther expence be necessary, and the insurer will not undertake at all events

(a) Vid. 2 Bur. 696, sup. 429.—(b) Vid. Lord Mansfield's judgment in *Kulen Kemp v. Vigne*, 1 T. R. 304, sup. 106.—(c) By the law of France, the ship being once captured, it is always a total loss; and the legal effect of it is presumed to continue, though the ship be released or retaken. The recovery of the goods insured is only for the account of the insurer, who cannot; under pretence that they are arrived at their port of destination, refuse the abandonment. The recovery of the goods is merely in nature of salvage. *Emerig. tom. 2, p. 188.*

to pay it, he may abandon.—The rule is, that, if the thing insured be recovered before any loss is paid, the insured is entitled to claim as for a total, or a partial loss, according to the final event; that is, according to the state of the case at the time he makes his claim. There is no vested right to a total loss, till the insured, having a right to abandon, elects to do so; for he is only entitled to an indemnity for his loss as it stands at the time of the action brought, or offer to abandon.

But if, after a total loss has been actually paid, the thing insured be recovered, the insurer cannot oblige the insured to refund the money he has received; but he shall stand in the place of the insured, and so no injustice is done.

The two following cases are cited as examples to shew that though a captured ship be recaptured, yet if the voyage be lost, the loss will be total, and the insured will have a right to abandon.

The first was the case of a ship insured from *London* to *Bermudas* and *Carolina*, taken by a *Spanish* privateer, and carried into *Boston* in *America*, where no person appearing to give security or answer for the moiety to satisfy the salvage, she was condemned and sold in the court of admiralty there. The recaptors had their moiety of the proceeds, and the surplus remained in the hands of the officers of the court.—An action at law was brought upon the policy by the insured, who obtained a verdict against the underwriter for a total loss. The underwriter filed a bill in Chancery, and moved for an injunction to stay the proceedings at law; insisting that the insured ought not to recover more than the moiety of the loss, as the stat. 13 G. II. c. 4, § 18, gave the thing saved to the owner, who was intitled to receive it from the officers of the admiralty court at *Boston*. The insured, in his answer, swore that he had offered, and was now willing, to *relinquish* his interest to the insurers in the benefit of the salvage, and would give them a letter of attorney to receive it.—Lord *Hardwicke* C. determined that there was no ground for an injunction in this case.—He said,—“At the time of the trial, the insured knew that the ship was retaken.—The ques-

If the thing insured be recovered before the loss is paid, the loss will be total or partial, according to the final event.

But if, after a total loss has been paid, the thing insured be recovered, the insured shall not be obliged to refund.

Though there be a recapture, yet, if the voyage be lost, the insured may abandon.

A ship is taken, and retaken, and sold in a distant country to pay the recaptors for the salvage, and the residue of the produce of the sales, remains in the court of admiralty there: The insured may abandon, and recover as for a total loss.

Pringle v. Hartley, in Chan. 1744, 3 Ark. 195.

tion arises on the Stat. 13 G. II. with regard to the salvage. It has been said, that there ought to be only half the loss recovered on the policy; and, as to that, the act has made great alteration in the law of nations, with respect to recaptures. The carrying a ship *infra presidia hostium*, or *se pernoctaverit* with the enemy, makes it the prize of the recaptor, as if it had been originally the ship of the enemy; but, by the act, the recapture reverts the property in the owner. If there had been a salvage, it must have been deducted out of the money recovered under the policy; but if none came to the hands of the insured, the jury could not take notice of it. It is uncertain whether the insured will receive any thing or not: And if any thing be recovered, he must have had an allowance for his expences in recovering it. Therefore, being willing to *relinquish his interest* in the salvage, he ought to have recovered *the whole money insured*. It would be mischievous if it were otherwise; for then, upon a recapture, the insured would be in a worse situation than if the ship were totally lost."

A ship, after throwing part of her cargo overboard in a storm, and being disabled from proceeding on her voyage till refitted, is captured and her crew taken out: But after being eight days in possession of the enemy, is recaptured and carried into an *English* port, upon which the insured give notice to abandon. Before the ship can be refitted, the rest of the cargo is spoiled:—This is a total loss, and the insured may abandon.

Goslin v. Withers,
2 Burr. 683.

In the second case, two insurances were made, the one on the ship *David* and *Rebecca*, the other on goods on board, "At and from *Newfoundland* to her port of discharge in "*Portugal* or *Spain*, without the *Streights*, or *England*."—In an action upon the former policy, the plaintiff declared upon a total loss by capture; upon the latter, the declaration alledged that divers quantities of fish and other merchandizes, were put on board; and averred that one fourth of the said goods were necessarily thrown overboard in a storm, to preserve the ship and the rest of the cargo; after which *jettison*, the ship and the remainder of the goods, were taken by the *French*.—It appeared on the trial, that the ship was taken on the 23d of *December* 1756; and the master, mates, and all the sailors, except an apprentice and a landman, were taken out of her and carried to *France*. The ship remained in the hands of the *French* eight days, and was then retaken by a *British* privateer, and brought into *Milford Haven* on the 18th of *January*; and immediate notice was given by the insured to the

the insurers, with an offer to abandon. Before the capture, the ship, in a violent storm, was separated from her convoy, and so disabled as to be incapable of proceeding on her voyage, without going into some port to refit. Part of her cargo was thrown overboard in the storm, and the rest spoiled, while the ship lay at *Milford Haven* after the offer to abandon, and before the ship could be refitted.—Upon this case, two questions were made; 1st. Whether this was a loss by capture for which the insurers were liable. 2dly. Whether, under all the circumstances, the insured had a right to abandon the ship to the insurers after she was carried into *Milford Haven*.—The court, upon great consideration, were clearly of opinion, that the loss was total by the capture; and that, after the voyage was defeated, the right which the owner had to obtain restitution of the ship and cargo, paying salvage to the recaptors, might be abandoned to the insurers, after she was brought into *Milford Haven*.—Lord *Mansfield* delivered the opinion of the court. The decision of the first point has been already mentioned in its proper place (a). Upon the second point, his lordship said,—“The single question upon which this case turns, is, whether the insured had, under all the circumstances, an election to abandon on the 18th of *January*. The loss and disability were in their nature total at the time they happened. During eight days the plaintiff was entitled to be paid by the insurer, as for a total loss; and in the case of a recapture, the insurer would have stood in his place. The subsequent recapture is, at best, a saving only of a small part: *Half the value must be paid for salvage*. The disability to pursue the voyage still continued. The master and mariners were prisoners. The charter-party was dissolved. The freight, except in the proportion of the goods saved, was lost. The ship was necessarily brought into an *English* port. What could be saved might not be worth the expence necessarily attending it. The subsequent title to restitution arising from the recapture, at a

A title to restitution arising from recapture, cannot take away a vested right to abandon, if the ship be unfit to perform the voyage.

(a) Sup. 102.

The insured may abandon upon a mere arrest or embargo by a prince not an enemy.

great expence (a), of a ship disabled from pursuing her voyage, cannot take away a right vested in the insured at the time of the capture. But because he cannot recover for any more than the loss he has sustained, he must abandon what may be saved. The better opinion of the books says,—“*Sufficit semel extitisse conditionem, ad beneficium assessoratori, de amissione navis; etiam quod postea sequeretur recuperatio: Nam per talem recuperationem non poterit præjudicari affecturatio (b).*” I cannot find a single book, ancient or modern, which does not say that, in case of a ship being taken, the insured may demand as for a total loss and abandon. What proves the proposition most strongly is, that by the general law, he may abandon in the case merely of arrest, or an embargo, by a prince not an enemy (c). Positive regulations in different countries, have fixed a precise time before the insured should, in that case, be at liberty to abandon. The fixing a precise time proves the general principle. Every argument holds strongly in the case of the other policy, with regard to the goods. The cargo was, in its nature, perishable, destined from *Newfoundland* to *Spain* or *Portugal*; and the voyage was as absolutely defeated, as if the ship had been wrecked, and a third or fourth of the goods saved. No capture by the enemy can be so total a loss as to leave no possibility of recovery. If the owner himself should retake at any time, he will be intitled; and by the stat. 29 G. II. c. 34, § 24, if an *English* ship retake at any time, before the condemnation or after, the owner is entitled to restitution, upon stated salvage. This chance does not suspend the demand upon the insurer for a total loss; But justice is done by putting him in the place of the insured, in case of a recapture. In questions on policies, the nature of the contract, as an indemnity and nothing else, is always liberally considered. There might be circum-

(a) By 29 G. II. c. 34, § 2, a moiety of the value of the captured ship was given to privateers, if the prize was above 96 hours in the possession of the enemy. But now by 33 G. III. c. 66 § 42, the salvage in all cases of recapture, by privateers, is fixed at one-fifth.—(b) *Roques*, n. 55.—(c) *Vid. sup.* 434.

stances, under which a capture would be but a small temporary hindrance to the voyage; perhaps none at all: As if a ship were taken, and, in a few days, escaped entire, and pursued her voyage. There are circumstances under which it would be deemed an average loss: If a captured ship be immediately ransomed (a) by the master, and pursue her voyage: there, the money paid is an average loss. And in all cases the insured may chuse not to abandon (b). In the second part of the usages and customs of the sea, (a translation from the *French*), a treatise is inserted called *Le Guidon*, in which, after mentioning the right to abandon upon a capture, it is added, "or any other such disturbance as defeats the voyage; or makes it not worth while, or not worth the freight, to pursue it (c)." I know that, in late times, the privilege of abandoning has been restrained for fear of letting in frauds: And the merchant cannot elect to turn what, at the time when it happened, was in its nature, but an average loss, into a total one, by abandoning. But there is no danger of fraud in the present case. The loss was total at the time it happened; and continued total, as to the destruction of the voyage. Nothing could be recovered, but upon payment of more than half the value, including the costs. What could be saved of the goods might not be worth the freight, for so much of the voy-

When the capture proves but a small temporary hindrance, the insured cannot abandon.

As if the ship be immediately ransomed, and pursues her voyage.

The insured is in no case obliged to abandon.

He may abandon if the voyage be defeated or not worth pursuing.

But he cannot, merely by abandoning, turn a partial into a total loss.

(a) Since this judgment was delivered, the ransoming of ships captured by the enemy has been prohibited by stat. 22 G. III. c. 35. sup. 432.—(b) *Le Guidon*, ch. 7, art. 1, says that abandonment depends on the will of the insured, who may resort to it as an *extreme remedy*.—(c) The passage in *Le Guidon* to which his lordship alludes, c. 7, § 1, is in these words: "Il est en liberté au marchand chargeur faire *delaix* à ses assureurs, c'est à dire, quitter et délaisser ses droits, noms, raisons, et actions, de la propriété qu'il a en la marchandise chargée, dont il est assuré, lors, et quand il advient naufrage du tout ou de partie, ou bien avarie qui excède ou endommage la moitié de la marchandise, quand il y a prise d'amis ou d'ennemis, arrest de prince, ou autre tel disturbance en la navigation; ou telle empirance en la marchandise, qu'il n'y ait moyen l'avoir fait naviger à son dernier reste, ou qu'elle ne vaille le fret, ou peu de chose d'avantage."

age as they had gone when they were taken. The cargo, from its nature, must have sold where it was brought in. The loss, as to the ship, could not be estimated, nor the salvage of half be fixed, by a better measure than a sale. In such a case, there is no colour to say that the insured might not disentangle himself from unprofitable trouble and further expence, and leave the insurer to save what he could. It might as well be argued that if a ship which had sunk, was weighed up again, at a great expence, the crew having perished, the insured could not abandon, nor the insurer be liable, because the body of the ship was saved."

It is not universally true that because a ship has once been captured the insured may abandon at any time afterwards.

In the above case Lord *Mansfield* declared, "*that he could not find a single book, ancient or modern, which did not say that, in case of a ship being taken, the insured may demand as for a total loss, and abandon.*"—The unqualified terms in which this is expressed, soon gave rise to a notion that the immediate consequence of a capture was a *change of property* in the thing insured, which vested in the insured a right to abandon when he pleased; and that he could not be divested of this right by any subsequent event.—That Lord *Mansfield* did not mean to be thus understood is obvious from the whole of his judgment in that case. But another case soon after occurred which afforded him an opportunity of explaining his own meaning in that judgment, and of settling and ascertaining those principles of law which have governed all the cases to which they were applicable, from that time to the present.

The rule is that if the thing insured be recovered before any loss is paid, the insured is only entitled to a partial or a total loss, according to the final event.

In this case it was settled, after solemn argument, and upon great consideration, that if the thing insured be recovered before any loss is paid, the insured can only be intitled to a total or a partial loss, according to the final event. This agrees with *Roccus* who puts this question: —*Asscurator qui jam solvit estimationem mercium deperditarum, si postea dictæ merces appareant et recuperatæ sint, an possit cogere dominum ad accipiendas illas, et ad reddendam sibi estimationem quam dedit?*—To this question he answers thus: *Distingue: Aut merces, aut aliqua pars ipsarum appareant.*

pareant, et restitui possint ante solutionem estimationis; et tunc tenetur dominus mercium illas recipere, et pro illa parte mercium apparentium liberabitur affecurator: Nam qui tenetur ad certam quantitatem respectu certæ speciei, dando illam, liberatur. Et etiam, quia contractus affecurationis est conditionalis, scilicet, si merces deperdantur: Non autem dicuntur deperdite, si postea reperiantur. Verum, si merces non appareant in illa pristina bonitate, aliter fit estimatio; non in totum, sed prout tunc valent. Aut vero post solutam estimationem ab affecuratore compareant merces, et tunc est in electione mercium affecurati, vel recipere merces vel retinere pretium (a).

The case above alluded to, was an insurance on the ship *Selby*, valued at 1200 l. and goods on board, from *Virginia* to *London*.—The ship sailed on the 28th of *March* 1760, from *Virginia* for *London*, and on the 6th of *May* was captured by a *French* privateer. The captain and six men were taken out of the ship, and only the mate and one man left on board. The *French* put a prize-master and several men on board to carry the ship to *France*; but in the way thither, she was retaken on the 23d of *May* by an *English* man of war off *Bayonne*, and sent into *Plymouth*, where she arrived the 6th of *June*. The plaintiff, at *Hull*, as soon as he was informed of what had befallen his ship, wrote on the 23d of *June* to his agent in *London* to acquaint the defendant, “that the plaintiff did “from thence abandon to him his interest in the said “ship as to the 100 l. insured by the defendant.”—The agent, on the 26th of *June*, acquainted the defendant with the offer to abandon, to which the defendant answered, “that he did not think himself bound to take to “the ship; but was ready to pay the salvage, and all “other losses and charges that the plaintiff had sustained “by the capture.”—On the 19th of *August* the ship, which had sustained no damage by the capture was brought to *London* by order of the owners of the cargo and the recaptors, and the whole cargo delivered to the freighters, who paid the freight without prejudice.—The question

A ship is captured, and all the hands but the mate and one man taken out of her. After 17 days, she is recaptured and sent into an *English* port, where she arrives a month after the capture: Yet, the voyage not being lost, the insured shall not be allowed to abandon after the ship's arrival.

Hamilton v. Mendes, 2 Burr. 1198, 1 Bl. 276.

(a) *Roccus*, h. t. n. 9, 50.

on this case was, whether the plaintiff, on the 26th of *June*, had a right to abandon, and to recover as for a total loss.—The court determined that he had no right to abandon, and that he could recover as for average loss only.—Lord *Mansfield*, in delivering the opinion of the court said,—“ The plaintiff has averred in his declaration, as the basis of his demand for a total loss, *that, by the capture, the ship became wholly lost to him.*— The general question is, whether the plaintiff, who, at the time of his action, brought at the time of his offer to abandon, and at the time of his being first apprized of any accident having happened, had only, in truth, sustained a *partial loss*, ought to recover as for a *total one*. In support of the affirmative, the counsel for the plaintiff insisted upon the four following points: 1, That, by the capture, *the property was changed*, and therefore the loss total for ever: 2, If the property was not changed, yet the *capture* was a total loss: 3, That when the ship was brought into *Plymouth*, particularly on the 26th of *June*, the recovery was not such as, in truth, changed the total, into an average, loss: 4, Supposing it did, yet the loss having once been total, a right *vested* in the insured to recover the whole, upon abandoning; which right could never afterwards be *divested*, or taken from him, by any subsequent event.—As to the *first point*: If the change of property was at all material, as between the insurer and the insured, it would not be applicable to the present case; because by the marine law received and practised in *England*, there is no change of property, in the case of a capture, till condemnation; and now by the act of parliament (a), in case of a recapture, the *jus postliminii* continues for ever. Many writers argue, between the insurer and the insured, from the distinction, whether the property was, or was not, so changed by the capture, as to transfer a complete right from the enemy to a recaptor, or neutral vendee, against the former owner. But arbitrary notions concerning the change of property by capture, as between the former owner

By the marine law, the property was not changed by the capture, till after condemnation. But since the 29 G. II. c. 34, the *jus postliminii* continues for ever.

(a) 29 G. II. c. 34, § 24.

and recaptor or vendee, ought never to be the rule of decision, as between the insurer and insured, upon a contract of indemnity, contrary to the real truth of the fact. And therefore I agree, upon the *second point*, that, by the capture, *while it continued*, the ship was totally lost; but it must be admitted that the property, in case of recapture, never was changed, but returned to the former owner.—The *third point* depends, as every question of this kind must, upon the particular circumstances. It does not *necessarily* follow that, because there is a recapture, therefore the loss ceases to be total. If the voyage be absolutely lost, or not worth pursuing: If the salvage be very high: If further expence be necessary: If the insurer will not engage, at all events, to bear that expence, though it should exceed the value, or fail of success: Under these, and many other like circumstances, the insured may disentangle himself and abandon, notwithstanding there was a recapture. The *Guidon* (a), amongst other instances of a total loss, where the insured may abandon, says, “*If the damage exceed half the value of the thing insured; or if the voyage be lost, or so interrupted that the pursuit of it is not worth the freight.*” But, in the present case, the voyage was so far from being lost, that it had met with only a short temporary obstruction; the ship and cargo were both safe; the expence incurred did not amount to near half the value; and when the offer was made to abandon, the insurer undertook to pay all charges and expences which the insured should be put to by the capture. The only argument to shew that the loss had not, upon the recapture, ceased to be total, was built upon a mistaken supposition, that the recaptor had a right to demand a sale, and to put a stop to any further prosecution of the voyage. But that is not so. The property *returns* to the owner, pledged to the recaptors for the amount of the salvage. Upon paying this he is entitled to restitution (b). The recaptor in this case had no right to sell the ship. If they had differed about the value, the court of admiralty would have ordered a com-

While the ship is in the hands of the enemy, she is considered as totally lost: Yet the property is not changed, but reverts in the original owner upon a recapture.

But a recapture does not in all cases prevent the loss being total.

In what cases a loss may be said to be total.

Upon a recapture the property returns to the original owner, pledged for the salvage.

(a) Ch. 7, § 1.—(b) Vid. 29 G. II. c. 34.

mission

mission of appraisement. It was the interest of all parties that the ship should forthwith proceed to *London*. Had the recaptor opposed it, or affected delay, the court of admiralty would have made an order for bringing her to to her port of delivery, upon reasonable terms. Therefore it is clear that, on the 26th of *June*, the ship had sustained no other loss than a short temporary obstruction, and a charge which the defendant offered to pay.—As to the *last point*: The plaintiff's demand is for an indemnity. His action, then, must be founded on the nature of his damnification, as it really was, at the time of the action brought. It is repugnant, upon a contract of *indemnity*, to recover as for a total loss, when the final event has determined that the damnification is, in truth, an average loss. Whatever undoes the damnification, in whole or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms to say that an action will lie for an indemnity, when, upon the whole event, no damage has been sustained."—To illustrate this, he put the case of an action of waste brought against a tenant, after he had repaired (a); and of an action brought by a surety, sued to judgment against his principal, after the principal had paid the debt and costs, and entered satisfaction on record; to shew that, by the common law, the injury being repaired before the action brought, is an answer to the action. He then said;—"But, in the present case the notion of a vested right in the plaintiff to sue as for a total loss, before the recapture, is only fictitious and not founded in truth: For the insured is not obliged to abandon, in any case. He has an election. No right can vest, as for a total loss, till he has made that election. He cannot elect before advice is received of the loss; and if that advice shews the peril to be over, and the thing insured in safety, he cannot elect at all; because he has no right to abandon when the thing is safe. Writers upon the marine law are apt to embarrass general principles with the positive regulations of their own coun-

Though there has at one time been a total loss, yet the insured cannot abandon until the final event has determined it to be only a partial loss at the time of the action brought.

By the common law, an action will not lie upon an indemnity, if before the action brought, the injury has been repaired.

There is no vested right to recover as for a total loss, till the insured, having a right to abandon, elects to do so.

(a) Vid. Co. Lit. 53, a.

try : But they seem all to agree that, if the thing be recovered before the money is paid, the insured can only be intitled according to the final event (a).—In the case of *Spencer v. Franco* (b), though upon a *wager policy*, the loss was held not to be total, after the return of the ship in safety ; though she had been seized, and long detained by the King of *Spain*, in a time of actual war.—In the case of *Pole v. Fitzgerald* (c), though upon a *wager policy*, the majority of the judges, and the House of Lords held there was no total loss ; the ship having been restored before the end of the four months, the time for which she was insured.—The present attempt is the first that was ever made to charge the insurer, as for a total loss, upon an *interest policy*, after the thing was recovered : And it is said, the judgment in *Goss v. Whithers* gave rise to it.”—Here he recapitulated the grounds of the judgment in that case (d), and proceeded thus,—“ But it is said that though the case of *Goss v. Whithers* was entirely different, some part of the *reasoning* warranted the proposition now inferred by the plaintiff from it. The great principle relied upon was, that, as between the insurer and insured, the contract being an indemnity, the *truth* of the facts ought to be regarded ; and therefore there might be a total loss by a capture, which could not operate a change of property ; and a recapture should not relate by fiction, like the *Roman jus postliminii* as if the capture had never happened, unless the total loss was in truth recovered. This reasoning proved, *à converso*, that if the thing, *in truth* was safe, no artificial reasoning shall be allowed to set up a total loss. The words quoted at the bar were certainly used (e), “ that there is no book, “ antient or modern, which does not say that, in case of “ the ship being taken, the insured may demand as for a “ total loss, and abandon.” But the proposition was applied to the subject matter, and is certainly true, provided the capture, or the total loss occasioned thereby, *continue*

If the thing insured be recovered before the loss is paid, the insured can only recover according to the final event.

If a ship be recovered after a long detention, it is not a total loss, even upon a *wager policy*.

A passage in the judgment of *Goss v. Whithers*, explained.

(a) Vid. *Roccus*, Not. 50, sup. 490.—(b) Sup. 441.—(c) 5 Bro. Parl. Ca. 131, inf. 504.—(d) Sup. 487.—(e) Vid. sup. 488.

to the time of abandoning, and bringing the action. The case then before the court did not make it necessary to specify all the restrictions. But I will read to you *verbatim*, from my notes of the judgment then delivered, what was said, to prevent any inference being drawn beyond the case then determined."—Here he read several passages from his argument in *Goss v. Whithers*, which is fully set forth in the foregoing account of that case, and then proceeded;—"From this way of reasoning it by no means followed, that if the ship and cargo had, by the recapture, been brought safe to the port of delivery, without having sustained any damage at all, the insured might abandon. But without dwelling longer upon principles or authorities, the consequences of the present question are decisive. It is impossible that any man should *desire* to abandon, in a case circumstanced like the present, but for one of two reasons: Either because he has *over-valued*; or because the *market has fallen* below the original price. The only reasons which can make it the interest of the party to *desire* to abandon, are conclusive against allowing it. If the valuation be true, the plaintiff is indemnified by being paid the charge he has been put to by the capture. If he has over-valued, he will be a gainer, if he be permitted to abandon; and he can only desire it because he has over-valued. This was avowed upon the first argument; and that very reason is conclusive against its being allowed. The insurer, by the marine law, ought never to pay less, upon a contract of indemnity than the *value* of the loss; and the insured ought never to receive more. Therefore, if there were occasion to resort to that argument, the consequence of the determination would alone be sufficient upon the present occasion. But, upon *principles*, this action could not be maintained as for a total loss, if the question were to be judged by the strictest rules of the common law: Much less can it be supported for a total loss, as the question ought to be decided by the large principles of the marine law, according to the substantial intent of the contract, and the real truth of the fact. The property, and daily negotiations,

When the ship is safe and the voyage is not lost, the insured ought not to be permitted to abandon.

The insurer ought never to pay less than the *value* of the loss, nor the insured receive more.

tiations of merchants ought not to depend upon subtleties and niceties; but upon rules easily learned and easily retained; because they are the dictates of common sense, drawn from the truth of the case. If the question depend upon the fact, every man can judge of the nature of the loss, before the money be paid: But, if it depend upon *speculative refinements*, from the law of nations, or the *Roman jus postliminii*, concerning the change, or vesting, of property; no wonder merchants are in the dark, when *doctors* have differed upon the subject from the beginning, and have not yet agreed.—To obviate too large an inference being drawn from this determination, I desire it may be understood, that the point here determined is, *That the plaintiff upon a policy can only recover an indemnity, according to the nature of his case, at the time of the action brought, or, at most, at the time of his offer to abandon.* We give no opinion, how it would be, in case the ship and goods were restored in safety between the offer to abandon and the action brought, or between the commencement of the action and the verdict: And particularly I desire that it may not be inferred, that in case the ship or goods should be restored, *after the money is paid as for a total loss*, the insurer could compel the insured to refund the money and take the ship or goods. That case is totally different from the present, and depends throughout, upon different reasons and principles. Here, the event had fixed the loss to be an average loss only, before the action brought, before the offer to abandon, and before the plaintiff had notice of any accident; consequently before he could make an election. Therefore, under these circumstances, we are of opinion that he cannot recover for a total loss, but for an average loss only; the amount of which is ascertained by the jury.—The judgment must be entered up as for the average loss stated in the case; viz. 10 l. per cent.

The following case will shew that if, upon a recapture, the captain find that the voyage cannot be pursued, and, acting fairly for the benefit of all concerned, he sell the ship and cargo to pay the salvage, and thereby put an end

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Questions of insurance should not depend on subtleties, but on plain and easy rules the dictates of common sense.

The insured can only recover an indemnity for his loss at the time of the action brought, or offer to abandon.

If after a total loss has been paid, the ship be restored, the insured shall not be obliged to refund.

If upon a recapture the captain sell the ship and cargo, as being the best to be done for all concerned; the insured may abandon.

to

to the voyage; the insured may abandon, and recover as for a total loss.

A ship and goods are captured and recaptured, and put in possession of the captain, who disposes of both and puts an end to the voyage; and in so doing, acts to the best of his judgment for the benefit of all concerned: The insured may abandon, and demand as for a total loss.

Miles v. Fletcher, Doug. 219.

A ship and freight were insured from *Montserrat* to *London*:—The ship was taken on her voyage on the 23d of *May* by two *American* privateers, who took the captain and all the crew, and part of the cargo (which consisted of sugars), out of her; and also took away the rigging. She was afterwards retaken and carried into *New York*, where the captain arrived on the 23d of *June*, and, taking possession of the ship, found that part of what had been left on board of the cargo, was washed overboard; that 57 hogheads of what remained was damaged, and that the ship was leaky, and could not be repaired without unloading her entirely. The owners had no storehouse at *New York*. No sailors were to be had there; and the only method he had of paying the salvage, was by sale of the ship or part of the cargo. He did not know of the insurance. The expence of repairing the ship would have exceeded the freight by more than 100*l*. There was an embargo on all vessels at *New York* till the 27th of *December*, and his ship ought to have arrived at *London* in *July*. Upon consulting with his friends at *New York*, he resolved to sell the ship and cargo, as the most prudent step for the interest of his employers. The cargo was accordingly sold and paid for. The ship was also contracted for; but the person who agreed to buy her ran away; and the captain left her in a creek near *New York*, and returned to *England*, where he arrived in the *February* following, and informed the plaintiff of what he had done. The plaintiff immediately claimed from the underwriters as for a total loss, and offered to abandon.—The underwriters resisted this claim. The insured brought an action on the policy, and went for a total loss. The defendant insisted that it was only an average loss.—Lord *Mansfield*, who tried the cause, told the jury, that if they were satisfied that the captain had done what was best for the benefit of all concerned, they must find as for a total loss. The jury found a verdict according to this direction; and upon a motion for a new trial, the court were clearly of opinion

opinion that the plaintiff had a right to *abandon*, and claim as for a total loss.—Lord *Mansfield* said;—“On the trial of this cause, it did not appear to me that there was any question of law, and no case was asked for. It was impossible to ask for one till the facts were ascertained; and when ascertained, it would have been impossible to state them in any way which could have left a doubt on the law. It was not contended that a capture *necessarily* amounts to a total loss, as between insurer and insured; nor, on the other hand, that, on a capture and recapture, there may not be a total loss, though there remains some material tangible part of the ship and cargo. Neither was it contended that the captain has an arbitrary power, by his own act, to make the loss either partial or total, as he pleases. The question is simply this, whether the consequences of the capture were such as, notwithstanding the recapture, occasioned a *total obstruction* of the voyage, or only a *partial stoppage*, as in the case of *Hamilton v. Mendez* (a). In that case, and in *Goss v. Withers* (b), great stress was laid on the situation of the ship and cargo, at the time when the insured *had notice*, at the time of the offer to *abandon*, and at the time of the *action brought*. No case says that the bare existence of the hulk of the ship prevents the loss being total. The cases where the insured may abandon are, “If the voyage be lost, or not worth pursuing;—If the salvage be high;—If further expence be necessary;—If the insurer will not, at all events, undertake to pay that expence (c), &c.” Here, at the time of the capture, there were no hopes of a recovery; no friend’s ship in sight; no means of resistance; all the crew taken out, and part of the cargo; and the rigging also taken away. When the ship was retaken and brought to *New York*, it still continued a total loss. Neither the insured nor the insurers, had any agent in the place. The court of admiralty must have proceeded *secundum equum et bonum*, and might have sold her for the benefit of those concerned.

A capture does not necessarily amount to a total loss; nor does a recapture prevent its being total.

In what cases the insured may abandon.

(a) Sup. 491.—(b) Sup. 486.—(c) Vid. sup. 493.

The captain has an implied authority to do the best he can for the benefit of all concerned, and the insurer is bound by his acts.

When the insured first had notice and offered to abandon, and when the action was brought, it was still a total loss. The voyage was abandoned, the cargo sold, and the ship left to be sold. The only answer the defendant makes, or can make to this, is, that the loss was total, indeed, but the captain made it so by his improper conduct; for that, on his taking possession of the ship, the loss became partial, and that he ought to have pursued the voyage.

But was this defence true in fact? The captain, when he came to *New York*, had no express order, but he had an implied authority, from both sides, to do what was right and fit to be done, as none of them had agents in the place. And for the consequences of whatever it was right for him to have done, if it had been his own ship and cargo, the underwriter must answer; because this is within the contract of indemnity. Suppose there had been no insurance, what ought the captain to have done?

1. As to the *cargo*: According to the course of the voyage, the ship should have arrived at *London* in *July*. On the capture, part had been taken out, some had been washed over-board, some damaged, and the whole, from the leakiness of the vessel, in a perishable state. There were no store-houses, nor could the ship proceed in the state she was in. The crew was gone, and an embargo laid on till *December*. What! shall a cargo, which was intended to arrive in *London* in *July*, be kept in a perishable state at *New York*, in a leaky vessel, till *December*.

2. As to the *ship*: It was certainly better to sell her, than to bring her to *London*. There was no crew belonging to her, and she had no cargo. Even if all the cargo had been left, the expence of repairs would have exceeded the freight. If she had been brought home, the expence of bringing her might have been more than what she would have sold for in *London*. It has been said, that the damage would not have fallen on the underwriters; but the argument drawn from thence is a fallacy, for that circumstance goes to determine it to be the interest of the insured to abandon the voyage. The question is, what did the owner suffer by the capture; and it appears that he suffered

suffered so much that it was not worth while to pursue the voyage. The whole voyage was lost. As the captain did not know of the insurance, he had no temptation to give the turn of the scale to the one side or the other. I left it to the jury to determine whether what the captain had done, was *for the benefit of the concerned*. If they had found that it was, in words, where would have been the question of the law (a)?"

So, if the ship be sold by the captors, and the captain acting as agent for the owners, purchase the ship on their account; this shall be considered as a recovery of the ship for the owners, and the money thus paid, as salvage; and if the voyage can be prosecuted, this is only a partial, and not a total, loss.

Thus:—A ship, insured for six months, was captured and carried into *Charlestown*, where she remained upwards of a month, and then was sold by the captors, and purchased by the captain for account of the original owners.—In an action on the policy, the defendant paid 60l. *per cent.* into court, as for a partial loss.—The plaintiff contended, that the ship having been captured and sold by the captors, after she had been a month in their possession, this was a total loss.—Lord *Kenyon*, who tried the cause, held that this was only to be considered as a partial loss, and that the owners could not abandon. He considered the captain as agent for the owners, recovering the vessel upon their account, and the price as a kind of salvage, the amount of which would be the loss sustained, and which only constituted an average loss. He admitted, however, that when the ship had been captured, and was carried into port, in the enemy's possession, the insured might, at that period, have abandoned. But not having abandoned, till after the ship was recovered, they could now only go as for an average loss.—The jury found a verdict according to this direction.

If the captain purchase the ship from the captors for account of his owners; the money paid, being in nature of salvage, is only a partial loss.

McMasters v. Schoolbred, Elop. Rep. 237. A

(a) In *Plantamour v. Staples*, sup. 378. Mr. Justice *Buller* adopts this doctrine, that the insurers are bound by the acts of the captain when he does what *he deems best* for the benefit of all concerned.

Having laid before the reader the authorities upon questions of abandonment, upon losses by capture, and arrest of princes; we will now proceed to consider,

2. *Of the right of abandoning in other cases.*

Shipwreck is always considered as a total

Shipwreck is generally a total loss. What may be saved of the ship or goods is so uncertain, and depends so much on accident, that the law cannot distinguish this from the absolute destruction of the whole. The wreck of the ship may remain and may be saved, but the ship is lost. A thing is said to be destroyed when it is so broken, disjointed, or otherwise injured, that it no longer exists in its original nature and essence. So the goods may remain; but if no ship can be procured in a reasonable time, to carry them to their place of destination, the voyage is lost, and the adventure frustrated.

But a stranding is not, of itself, deemed a total loss.

But the mere *stranding* of the ship is not, of itself, deemed a total loss, so as to entitle the insured immediately to abandon. If by some fortunate accident, by the exertions of the crew, or by any borrowed assistance, the ship be got off and rendered capable of continuing her voyage, it is not a total loss, and the insurers are only liable for the expences occasioned by the stranding. It is only where the stranding is followed by *shipwreck*, or in any other way renders the ship incapable of prosecuting her voyage, that the insured is entitled to abandon (a).

No partial loss, however great, can be turned into a total loss.

It is a rule that, to entitle the insured to abandon, there must have been, at some period of the voyage insured, or during the continuance of the risk, a total loss; and the following cases will shew that no partial loss, however great, occasioned by the perils of the sea, can be turned into a total loss.

A ship performed her voyage, but was so damaged as not to be worth repairing; yet, as the damage was only

An insurance was made on the ship *Friendship* from *Wynburgh* to *Lynn*.—In an action on the policy, the defendant pleaded a tender of 48 l.—The plaintiff claimed as for a total loss, and upon the trial of the cause, it appeared

(a) Vid. *Emerig.* tom. 2, p. 180.

that the ship had suffered so much in her voyage, that when she arrived at *Lynn*, she was not worth repairing. The damage, however, sustained by the ship, did not exceed 48 *per cent.*, the sum which the defendant had paid into court upon his plea of tender.—Upon this case the defendant insisted that this was a *partial* and not a total loss, and that therefore the plaintiff had no right to abandon.—The court were clearly of opinion that the owner cannot abandon, but in the case of a total loss, and that they could not determine that there had been a *total loss*, when the jury found that there was only a loss of 48 *per cent.*—Mr. Justice *Alburtis* said,—It will be making the insurers answerable for the goodness of the ship, if they are held liable for more than 48 *per cent.* It is stated that the ship was not worth repairing; but *non constat* that, if the ship had not received any damage during the voyage, she would have been worth repairing: And though she was not in a sound state, yet she had been 24 hours in safety; and the jury having ascertained the amount of the damage she has sustained, I cannot say that the plaintiff ought to recover more.”—Mr. Justice *Butler* said,—“Nothing can be better established than that the owner of a ship can only abandon in the case of a total loss happening at some period or other of the voyage; which can not have happened in this case, as the jury have expressly found that the loss amounted to 48 *per cent.* In the case of *Jenkins v. Mackenzie*, though the ship was brought into port, yet the capture, as between the insurer and the insured, was a total loss. The true way of considering this case is, that it was an insurance on the ship, for the voyage; and if either the ship or the voyage be lost, it will be a total loss; but here neither was lost. The case of *Hamilton v. Montez (a)* is decisive.”

So, where the ship *Prince of Wales* was insured, “in port or at sea, for six months from the 18th of July 1777.”—The ship was in government service bound from *Cork* to *Quebec*. She arrived there; but the season being so far advanced before she was ready to return, she was

estimated at 48 *per cent.* this is not a total loss, and the insured cannot abandon.

Cazalet v. St. Barbe, 1 T. R. 187.

If a ship in her voyage receives great damage, but arrive at her port of destination, and remain 24 hours in safety; this cannot be a total loss.

A ship, insured for six months, receives a great injury within the time; and the captain being unable to get her repaired, sells her, after the time: This is not a total,

(a) Sup. 491.

but a partial loss; the ship being only damaged, not lost.

Furneaux v. Bradley, B. R. East, 10 G. III. Park, 166.

removed into the bason; from whence on the 19th of November she was driven by a field of ice, and damaged by running on the rocks. Her condition could not be examined into, till the April following, after the expiration of the policy. She was then found to be bulged, and much injured, but not irreparably so. In the progress of the repair, difficulties arose for want of materials; and the captain, after consulting the merchants and agent in the place, sold her. An account was made up charging the insurers with the whole amount, and crediting them for the money for which the ship was sold, as salvage.—Lord Mansfield, at the trial, said, “The great point in the case is, whether this be a total loss by this accident. It is a new question, upon which I shall reserve a case for the opinion of the court.”—A case being reserved, the court, after argument, were of opinion that the ship should be considered as *damaged*, on the 19th of November, but not *totally lost*.—Lord Mansfield said, the justice of the case seemed to be that the loss in November should be taken as an *average*, not as a *total loss*.

A privateer, insured for four months free from average, is forced into port by a mutiny of the crew, but is in safety at her port after the four months are expired: The insured can recover for no loss—not for an average loss, because the insurance was free from average; and not for a total loss, because it was only an average loss.

Fitzgerald v. Pole, 5 Bro. Parl. Ca. 131, 1 Villet, 641.

So, where the *Good Fellow* privateer was insured, “At and from Jamaica on a cruise for four months, valued at 1000 l. without farther account and free from average.”—Upon a special verdict it appeared, that while the privateer was on her cruise, and within the four months, the crew mutinied against the captain and his officers, and by force carried the ship to Jamaica; and before her arrival there, by force, seized the boat, fire arms, and cutlasses, carried them off and deserted the ship; whereby the voyage and cruise were prevented and lost for the remainder of the four months: That the ship arrived at Jamaica, but not till after the end of the four months.—Upon this case the King’s Bench gave judgment for the plaintiff.—Upon a writ of error, the Exchequer Chamber unanimously reversed that judgment, and the House of Lords confirmed the judgment of reversal; being of opinion, with the majority of the judges, that the insurer, being, by the terms of the policy, free from all average, the plaintiff could not be entitled to recover but in case of a total

total loss; and the ship being found, by the special verdict to be in good safety, at her proper port, at and after the end of the four months, for which the insurance was made, there could be no loss (a).

If, by any accident or misfortune, the ship be prevented from proceeding on her voyage, and the voyage be thereby lost; this is a total loss, not only of the ship and freight, but also of the cargo, if no other ship can be procured to carry it to its port of destination.

Thus:—An insurance was made on the ship *Grace*, her cargo and freight, “At and from *Tortola* to *London*; warranted to depart on before the 1st of *August* 1781. “The ship valued at 2,470 l. the cargo at 12,400 l. “and the freight at 2,250 l.; at 25 guineas *per cent.* “to return 10 *per cent.* if she departed with convoy “from the *West Indies*, and arrived; the ship, freight, “and goods warranted free of particular average.”—The ship and cargo had been a *Dutch* prize, condemned at *Tortola*; but during four or five months that she staid there, was never unloaded. On the 1st of *August* the whole fleet of merchantmen, with their convoy, got under weigh; but not being able to get clear of the islands that day, they came to an anchor during the night, and the next day cleared the islands. About ten o’clock that day, several squalls of wind arose, which occasioned the ship to strain and make water so fast, that the pumps were obliged to be worked; and on the 3d the captain made a signal of distress, in consequence of which she was obliged to return to *Tortola*. On her arrival there, the captain made his protest; and a survey was had, by

But if the voyage be lost, from whatever cause, it is a total loss.

On a voyage from *Tortola* to *London*, the ship by sea damage is obliged to put back on the third day, and can not be repaired there, and no other ship can be got for the cargo: This is a total loss of the ship, freight, and cargo; and the insured may abandon.

Manning v. Newnham, B. R. Tr. 22 G. III. MS. S. C. Park, 169.

(a) It has been said (*Park*, 170.) that cases like the present can never arise again, because it originated in a wager policy, which is prohibited by law.—The policy, in this case, can scarcely be said to have been a wager-policy: It was rather a valued policy, free from average; But it must be recollected that there is in the Stat. 19 G. II. c. 37, a proviso to exempt privateers from the operation of the first clause, which prohibits insurances Interest or no interest; and therefore the policy in this case would be a good and valid policy at this day.

5122

which

which the ship was declared unable to proceed to sea with her cargo, upon a *London* voyage, and that she could not be repaired in any of the *English* islands in the *West Indies*. There was no evidence of any special damage to the cargo, which was sold for within 700 l. of the value. The owners purchased two-thirds of it; the greatest part of which might have been sent home and sold at a great profit. The insured claimed as for a total loss on the ship, cargo, and freight. At the trial, though the cargo was warranted free from average, yet it seemed dangerous to permit the insured to abandon, and thus turn an average into a total loss. The jury, however, thought the insured entitled to what he claimed, and found accordingly.—Upon a motion for a new trial, the court, upon full consideration, were of opinion that the verdict was right and ought to stand.—Lord *Mansfield* said,—“At the trial, my prejudices were in favour of the underwriters; but upon better consideration, I agree with the rest of the court that the jury did right. *If, by the perils insured against, the voyage be lost and gone, it is a total loss, otherwise not.* The ship received an irreparable hurt within the policy, which drove her back to *Tortola*, where only two ships could be had, both together not capable of taking the whole of the cargo on board. The voyage was so completely lost, that no ship could be got; and the insured was unable to send that part of the goods which they had purchased, forward to *England*; and yet no body bought but to send to *England*. If the voyage could have been continued in another ship, there might have been freight *pro rata*. But it was admitted that there was a total loss on the freight, because the ship could not perform her voyage; and the insured were not to wait till ships could be had. The same argument applies to the ship and cargo. This is a contract of indemnity, and the insurance is that the ship shall come to *London*. Introducing nice distinctions is inconvenient and dangerous: Upon turning this case in every view, the court are of opinion that the voyage was totally lost; and this is the ground of our determination.”

If a cargo be damaged in the course of the voyage, and it appear that what has been saved is less in value than the amount of the freight; this is clearly a total loss. This doctrine is warranted not only by the passage from *Le Guidon* which has been already cited, but also by the opinion of Lord *Mansfield* in the case of *Goss v. Withers* (a), and by that of Lord *Hardwicke* in the following case.

If a cargo be damaged so as to be reduced in value to less than the freight, it will be a total loss.

An action was brought on a policy of insurance upon corn for 200 l. but of the value of 217 l., the defendant having suffered judgment to go by default, upon the execution of a writ of enquiry, before Lord *Hardwicke*, it appearing that the corn being damaged, was sold for only 67 l., and the freight came to 80 l.—Upon this, the question was whether, as the freight exceeded the salvage, this was not to be considered as a total loss. For the plaintiff it was insisted that he ought not to be in a worse situation than if his corn had gone to the bottom; for then he would have had no freight to pay; but now that the voyage has been performed, whereby freight is become due, he has a right to apply the salvage to discharge it. It was proved to be the usage that, where the salvage exceeds the freight, to deduct the freight out of the salvage, and make up the loss upon the difference.—For the defendant it was insisted that, as his insurance was upon the corn, and the whole did not perish, he ought, in making up the loss, to deduct the salvage: But no instance could be shewn, on either side, of an adjustment where the freight exceeded the salvage.—The Chief Justice was of opinion that, within the reason of deducting the freight, where the salvage exceeds it, the plaintiff, in this case, where it fell short, was intitled to have it considered as a total loss. The jury found according to this direction (b).

Boysfield v. Brown, at N. P. 2 Str. 1065.

In

(a) Vid. sup. 486.—(b) This case was before the year 1749, when the common memorandum was introduced into policies; that corn, &c. should be free from average, unless generally or

When the insured may abandon by the law of France.

In *France* the distinction is this : In case of shipwreck, the insured may abandon, though the goods be recovered and carried to their place of destination, because goods thus saved are generally in a bad and unmarketable condition. But if the ship become innavigable, the insured cannot abandon the goods, if by any other ship they may be conveyed in time to their place of destination (*a*).

Sect. 2.

Within what Time the Insured may abandon.

Some time should be fixed when the degree of the insurer's responsibility should be ascertained.

It seems reasonable and necessary that some time should be fixed when the degree of responsibility of the underwriter should be ascertained; and therefore in several maritime states on the continent, positive regulations have been established, limiting the time, after a loss has happened, within which the insured may abandon. In *France*, *Spain*, and *Holland*, the times are limited by law, according to the distance of the place where the loss happens, within which the abandonment must be made (*b*).

In *England*, the insured, as soon as he is informed of a total loss, must elect to abandon or not. If he mean to do so, he must give reasonable notice to the insurers; otherwise he will waive his right to abandon.

But the times thus limited must often prove either too long or too short, and frequently occasion great loss and inconvenience either to the insured or the insurer. In *England* we have no such positive regulation, nor any time limited by law for abandoning: Our courts have laid down a rule, which seems better suited to the practice of commerce, and more likely to prevent frauds than those we have just alluded to. This rule is, that as soon as the insured receives advice of a total loss, he must make his election whether he will abandon or not: If he determines to abandon, he must give the underwriters notice of this *within a reasonable time* after the intelli-

the ship be stranded. Vid. *Mason v. Scurray*, sup. 143, where in a similar case, Lord *Mansfield* held it to be but a partial loss, for which, as that case was upon a policy with the common memorandum, the insurer was not liable.

(*a*) *Emerig.* tom. 2, p. 187, 188.—(*b*) Vid. Ord. de la mar. h. t. art. 48, 49; 2 *Mag.* 416.

gence

gence arrives; and any unnecessary delay in giving this notice will amount to a waiver of his right to abandon; for unless the owner does some act, signifying his intention to abandon, it will be only a partial loss, whatever may be the nature of the case, or the extent of the damage (a). This rule, which has been long established, is analogous to the general principle of the common law, which requires that all notices of acts affecting the interests of third persons shall be given *within a reasonable time*. In the following case this doctrine was first explicitly laid down by the court of King's Bench.

An insurance was made on goods "from *Jamaica* to "*London*."—The ship was captured by an *American* privateer; and in a few days afterwards the captor, having stripped her of her stores and part of her rigging, and having taken out some of her hands, set her at liberty. There was a clause in the policy to exempt the underwriters from average losses under 3 *per cent*: And the part of her cargo taken out did not amount to that sum. In consequence of the ship's losing a part of her crew, it became impossible for her to pursue her voyage, and she was obliged to bear away for *Charlestown*, where she was put into the hands of one *Cruden*, a part-owner, who sold the cargo, but remitted none of the money home. In his books, he gave the *underwriters* credit for the amount. At the time of the sale, he was in bad circumstances, and afterwards became insolvent. It appeared, however, that the other owners looked to *Cruden* for two or three years for payment; during all which time, no notice of abandoning was given by the insured to the underwriters. In an action on the policy, the defendant paid a sum of money into court being the amount of the average loss.—Two questions were made at the trial: *First*, whether the plaintiffs were intitled to recover as for a *total loss*. Upon this, Mr. Justice *Buller*, who tried the cause, was of opinion that, as there had been a capture, which, for a time, had occasioned a total loss, the owners had an option to abandon, or not, as they

A ship being taken, the captor takes out her stores and part of her crew, and sets her at liberty: This obliging her to return into the nearest port, her voyage is lost, and her cargo, which is insured, is sold by an agent, who becomes insolvent.—

After 3 years, in which the insured adopts the acts of the agent, he shall not be at liberty to abandon, and throw the loss occasioned by the failure of the agent on the underwriters. He might have abandoned, but he ought to have done so immediately on receiving intelligence of the loss. Not having done so, he gives credit to the agent.

Mitchell v. Edie,
1 T. R. 608.

(a) Per *Buller*, J. 1 T. R. 616.
pleased;

pleased: But, if they had chosen to abandon, they ought to have done it immediately, upon receiving intelligence of the loss; and, as they had not done so, but had looked to *Cruden*, as their agent, for payment, they had waived their right to abandon, and could only recover as for a *partial loss*. The second question arose out of the particular circumstances of the case, not properly belonging to this branch of the subject, and, indeed, of no general importance. The jury found a verdict for the defendant.—Upon a motion for a new trial, the court (a) were clearly of opinion that the plaintiff was not intitled to recover.—Mr. Justice *Asburst* said;—"The general rule is, that where any part of the property insured has been saved, the insured cannot recover as for a total loss, unless he make his election to abandon, and give reasonable notice to the underwriters of his intention. But it is contended that the insured never waive their right to abandon while they are managing in the best manner they can for the benefit of all concerned: And that argument is grounded on the common clause inserted in every policy, whereby the insured is authorised, "to sue, labour and travail, in and about the defence, "safeguard, and recovery of the goods, &c.: without "prejudice to the insurance." Now this clause does not warrant the position to the extent contended for. The meaning of it is, that, till the insured have been informed of what has happened, and have had an opportunity of exercising their own judgment, no act done by the master shall prejudice their right of abandoning: And this is reasonable, because the loss may happen at a great distance, so that the insured cannot exercise their judgment immediately: It is therefore necessary that the master, who is on the spot, should do the best he can. But the insured are bound to decide, and signify their election to the underwriters the first opportunity; for though the person who takes upon him to act on the occasion for the benefit of all concerned, is not the agent of the insured, yet if, upon receiving no-

The meaning of the clause in the policy which enables the insured to labour for the recovery of the goods without prejudice to the insurance.

The insured is bound to decide and give notice of his decision the first opportunity.

(a) Mr. Justice *Asburst* and Mr. Justice *Buller*.

tice of the loss, they do not elect to abandon, they adopt the acts of such person, and make him their agent. This is something like the notice that is to be given to the drawer of a bill of exchange, in case of non-payment, which, if the holder omit to do, he is considered as giving credit to the acceptor, and therefore the loss, if any, must fall on him. There may be cases where the acts of the captain may not make him the agent of either party; and then he only acts in common for them both, till notice is received by the parties at home. If, after such notice, he is continued in the agency, he becomes the agent of the party by whom he is so confirmed: But he cannot be considered as the agent of the underwriters, till notice has been given to them, and they have had an opportunity of exercising their discretion, whether they will or will not continue him; though, till notice of the loss was first received by the insured, the property continued at the risk of the underwriters. Here, *Cruden* for near three years was considered by the insured as their agent; credit was given to him in that character; frequent applications were made to him for payment; and, till his insolvency, there was no appearance of any intention to disown him: That was the first moment when the insured thought of abandoning.—Mr. Justice *Buller* said;—"It is true that the insured are not bound to abandon: On the contrary, all the cases have said that where they are intitled to abandon, they have the option to do so or not; but unless they do elect to abandon, it is only an average loss.—The only point to be considered is, whether this doctrine will be productive of any uncertainty: If it would, that would be a sufficient reason, in a new case, for not adopting it. But, in my opinion, a contrary decision would be productive of infinite uncertainty; for it would leave open a very vague question, namely, what time the insured should be allowed to abandon. If it can extend to three years, there is no reason why it should not extend to a much longer period: But no uncertainty can follow from this determination: for our opinion is, that when the account of a loss has reached the insured, they must make their election

If he neglect this, he adopts the acts of the agent.

If the captain be continued in the management after such notice to the underwriters, he becomes their agent.

election whether they will abandon or not: If they do, they must give notice of their intention, to the underwriters, within a reasonable time. If they act otherwise, they cannot be permitted, at any subsequent period to change a partial into a total loss."

In the following case the above principles were adopted and enforced by Lord *Kenyon*; and, indeed, they have ever since been received and acted upon as clear law.

Goods were insured, "At and from *London* to *Jamaica*."

—The ship was taken by a *French* privateer within a few leagues of *Jamaica*. Part of the property insured was taken out of the ship. The captain, boatswain, and all but seven men, were also taken out of her. In a fortnight after, as the captors were proceeding to *America*, the ship, with the remainder of her cargo, was retaken by an *English* frigate, and sent into *Antigua*; and both were sold there under a decree of the vice-admiralty court, by a prize agent, who received the proceeds to be paid over to the concerned, deducting one eighth for salvage, according to the late prize act (a). The capture and recapture were entered at *Lloyd's* on the 15th of *February* 1795; but it was not known whither the ship was carried till the 30th of *March*, when a letter was received at *Lloyd's*, addressed to the owners, freighters, and underwriters, from the judge of the vice-admiralty court at *Antigua*, informing them of the arrival of the ship, and of the sale of the ship and cargo, under a decree of the court; and desiring to have some agent appointed to remit the proceeds to *England*. Powers of attorney were sent out in *April* by the insured, for this purpose; with orders to remit the proceeds to the banking-house of *Smith, Payne* and *Smith*, one of whom was agent to the insured. —It was objected on the part of the defendant, that although the insured as well as the *insurers* were informed of the loss in the beginning of *April*; yet the insured did not abandon till *August*, near four months after the power of attorney had been sent out to *Antigua*. To this it was answered that, the property having been absolutely

A recaptured ship is carried into a distant port, and there sold for the benefit of all concerned, and the insured give directions to the agent to have the proceeds remitted to them, but afterwards, and four months after they had notice of the loss, they give notice of abandonment. —This is too late.

Allwood v. Hensell, at N. P. B. R. after Mich. 1795. *Park* 172.

(a) 33 G. III, c. 66.

fold, and converted into money, before the insured knew where the ship was taken to; the loss was total in its nature, and therefore there was no occasion to abandon.—Lord *Kenyon*, who tried the cause, inclined to think that an abandonment was necessary, and that the case was the same as if the property had not been sold, but remained in *specie* at *Antigua*. But he gave no decided opinion on this point. He said the insured were not bound to abandon in any case; and might, in case the sales had been very advantageous, have taken the benefit of them, in the same manner as they might have returned the property, if it had remained in *specie*. But the insured must make his election speedily, whether he will abandon or not, and put the underwriter in a situation to do what is necessary for the preservation of the property, whether sold or unsold: “He cannot,” said his lordship, “lie by, and treat the loss as an average loss, and take measures for the recovery of it, without communicating that fact to the underwriters, and letting them know that the property is abandoned to them.”—There was a verdict for the plaintiff only for an average loss.

The insured must make his election speedily.

He cannot treat the loss as a partial loss, and then abandon.

So, if a ship be insured for part of her value, and being captured, the insured demand as for a total loss, which the underwriters are willing to pay, on having an assignment of *one fourth* part of the ship from the owner, by way of abandonment; but the insured refuse this, because the one fourth of the ship is of greater value than the sum insured; and the insured instead of abandoning, repurchase the ship from the enemy:—In this case, he is not entitled to recover as for a total loss, not having abandoned; nor can he recover the sum paid for the repurchase of the ship, that being an illegal contract, and not only a trading with the enemy, but also a ransom, within the meaning of the ransom acts. This will be found determined in the following case.

If the underwriters demand an abandonment of more than they have insured, this need not prevent the insured from abandoning to the amount of the sum insured: But if he neglects this, he shall not afterwards recover as for a total loss.

The ship *Themis* was insured for twelve months, and sailed on the 4th of *April* 1797, on a voyage from *Shields* to *Riga*; was captured on the 7th of *April* by a *French*

A *British* ship is captured, and carried into a neutral port, and there condemned by the enemy's

consul: If the insured do not abandon, but repurchase the ship sold under the sentence, he shall not recover as for a total loss; the property never having been out of him by the condemnation; nor shall he recover the sum paid for the repurchase, that being a ransom, and illegal.

Harelock v. Rackwood, 8 T. R. 268. Vid. sup. 289.

privateer, and carried into *Bergen* in *Norway*, where, on the 17th of *April*, she was condemned by a sentence of the *French Consul* there.—News of this being brought to *England* by the captain, the plaintiff demanded a total loss from the underwriters, on which he received a letter from their broker, informing him that they were ready to settle with him, he first making an assignment of one fourth part of the ship to the broker for their benefit; and that, if the plaintiff had any thoughts of repurchasing the ship, the underwriters would have no objection to pay their quota of the price.—The sum insured not amounting to one fourth of the value of the ship, the plaintiff declined making the assignment.—There were frequent instances of this sort of condemnation in the port of *Bergen* during this war, which were made with the knowledge of the *Danish* government, who received duties thereon, and on the sales in consequence of them. On the 13th of *July* 1798, the ship was sold by public auction, by the officer appointed by the court of *Denmark* for such sales, and was purchased for the plaintiff, by his agent at *Bergen*, for the sum of 1628l. 8s. 4d., which was her fair value. The ship, being then repaired, instead of proceeding to *Riga*, sailed to *Petersburgh*, and afterwards returned to *England*.—In an action upon this policy, the defendant paid 30l. 11s. 3d. *per cent.* into court, and upon the trial there was a verdict for the plaintiff as for a total loss, subject to the opinion of the court on a case which stated the above facts.—The questions for the opinion of the court were, 1st, Whether the plaintiff was entitled to recover as for a total loss, or only for a partial loss. 2dly, If for a partial loss only, then, whether the sum paid for the purchase was to be included, in which case a nonsuit was to be entered.—It was contended on the part of the plaintiff, that he was entitled to recover as for a total loss, on the ground that the ship was captured by an enemy, and condemned by a court of competent jurisdiction: But the court expressing a decided opinion that no *French* court of admiralty could legally be holden in *Denmark*, adopting the decision

in our court of admiralty, respecting the ship *Flad Ogen* (a), that point was abandoned as untenable.—It was then insisted, 1st. That when the ship was captured, the plaintiff had a right to abandon, and did in fact abandon; and 2dly, That at least the plaintiff was entitled to recover as for a partial loss, in which was to be included the sum paid for the repurchase of the ship.—On the part of the defendant it was answered, 1st. That whatever right the insured might have had to abandon at one time, he ought to have made his election to do so, immediately after the capture; but he refused to transfer his right to the insurer, and therefore he could not say that he was ready to abandon; 2dly. That if this was only a partial loss, the price paid for the repurchase of the ship ought not to be included in it, that being a void contract, not only by the ransom acts, 2 G. III. c. 25, and 35 G. III. c. 66, § 37, 38, 39, but also by the common law, on the ground of its being a trading with the enemy.—The court determined that the plaintiff was not entitled to recover on either of the grounds upon which he attempted to support his case.—They declined giving any opinion on the question, whether the contract at *Bergen* was void, on the ground of its being a *trading with the enemy*, as that question would shortly come before the court upon a writ of error, in the case of *Potts v. Bell* (b). The only question then remaining was that relative to the ransom. Upon this, they were clearly of opinion, that the transaction above stated amounted to a ransom; that the money paid by the plaintiff to regain the possession of his ship was illegally paid; and consequently that it could not constitute a charge on the underwriter.

But if, by any interference of the underwriters, the insured be actually prevented from abandoning, the un-

But if the insurers in any manner prevent the abandonment, they shall pay the whole loss, to the amount of the sum insured.

(a) Vid. sup. 289—(b) In that case it has since been determined, upon great consideration, that any trading by a *British* subject with the enemy, without the King's licence, is illegal, and that a policy on goods bought from the enemy is void. Vid. sup. 73.

derwriters are liable for all the loss sustained by the insured to the extent of the sum insured.

A total loss having happened, the insured proposes to abandon, but is dissuaded from it by the underwriters, who order the ship to be repaired, but afterwards refuse to pay for the repairs, and the ship is, on this account, obliged to be sold: The insurers are liable for all the loss sustained, to the amount of the sum insured.

Da Costa v. Nequham, 2 T. R. 407.

As, where a ship was insured "from *Leghorn* to *London*, with liberty to touch at *Nice*." The ship met with an accident in the course of her voyage, and was obliged to put into *Nice* to repair. Advice of this was transmitted to the owner, and they were informed that it would be necessary to unload, by which a considerable expence must be incurred. This he communicated to the underwriters, and expressed a desire to abandon. Some altercation arose; they insisting on the vessel's being repaired, and telling him to pay the bills. He at last consented to this; but refused to advance any money; in consequence of which it became necessary to take up a large sum of money on bottomry. The ship was refitted and resumed her voyage, and gained freight afterwards. Upon her arrival at *London*, application was made to the underwriters, to take up the bottomry bond, which they refused, and the vessel was obliged to be sold, to satisfy that debt, so that she never was in the possession of the insured again. There was due upon the bottomry bond 6781., and the ship sold for 6301.—Under these circumstances, Mr. Justice *Buller*, who tried the cause, was of opinion, and it was so agreed at the trial and not afterwards disputed, that there had not been a total loss at *Nice*; for though the plaintiff offered, and was intitled, to abandon, yet, in truth, he had not abandoned. This therefore was considered only as an average loss.—But Mr. Justice *Buller*, at the trial, and the court afterwards, determined, that the underwriters were answerable for all the injury that had accrued to the owner in consequence of their interference, and directions, and their subsequent refusal to discharge the bottomry bond: That, in consequence of this, the ship never came free to the owners hands, but was obliged to be sold, and therefore the underwriters were liable to the amount of the insurance.

If the ship be not heard of in a reasonable time,

In a former chapter it was shewn that if no intelligence be received of a ship within a reasonable time,
it

it shall be presumed that she foundered at sea (a). When the time has elapsed which affords that presumption, the insured may abandon, and claim as for a total loss.

the insured may abandon.

Sect. 3.

Of the Form of the Abandonment.

IN the preceding section we have seen that, as soon as the insured is informed of a total loss, he must make his election whether he will abandon or not. If he determine to abandon, and demand as for a total loss, he is not obliged, as in some foreign countries, to make a formal protest (b), but merely to give notice of the loss to the underwriters, and of his determination to abandon.

Notice of abandonment.

It is singular, however, that an abandonment is not made in any particular form, or accompanied by any of those solemnities which such an important act would seem to require. But in whatever form an abandonment is declared, it must be explicit, and is not to be taken as matter of inference from an equivocal act.

There is no particular form of an abandonment. But it must be explicit.

Therefore, where a letter from the insured, stating that the ship had been forced on shore, and a quantity of sugars damaged, was shewn by the broker to the underwriters; and they, by way of answer, desired, "that the insured would do the best they could with the injured property;"—in an action on the policy, it was insisted that this letter amounted to an abandonment, and that the answer of the underwriters was an assent to it.—But Lord *Kenyon*, who tried the cause, said, that as this was but a partial loss, the insured could not, by their own act, turn it into a total one. That it was the interest of the underwriters, and the duty of the insured, to make a partial loss as

The insured informs the underwriters that the ship has been stranded, and the goods damaged, and the underwriters desire the insured to do the best they can with the goods; this will not turn a partial into a total loss.

Thelluson v. Fletcher, Esp. Rep. 72, sup. 105.

(a) Vid. sup. ch. 13, § 1. p. 416. *Emerig. tom. 2, p. 181.*—
(b) Vid. *Polhier, h. t. n. 126. Emerig. tom. 2, p. 190.*

light as possible; and that this was the meaning and import of the letter, and of the answer of the underwriters.

There must be some notice, if the insured means to abandon.

This notice of abandonment may be given, either to the underwriter himself, or to the agent who has subscribed for him. And this is necessary though the ship and cargo were sold and converted into money before the notice of the loss was received (*a*).

If the insurance be entire, the insured cannot abandon for part only.

In general, the abandonment ought to be made for the whole of the effects insured, and not for a particular part; as if part be rotten, the insured cannot abandon that part only and retain the rest, but he must abandon the whole or nothing; for the contract being entire, cannot be severed (*b*).

Thus, if I have divers sorts of goods on board a ship; as sugars, indigo, and cotton; and I insure 1000 l. on the whole, without any distinction; this insurance is entire, and I cannot abandon my sugars, and retain my indigo and cotton (*c*).

But if different articles be separately insured or separately valued, any one of them may be abandoned.

But if I insure these articles by different policies; or if, in the same policy, they be separately valued; I may abandon any one article and retain the rest; because these are, in effect, distinct insurances, though in the same policy (*d*).

So, if an insurance be made on a ship and cargo distinguishing how much for the one, and how much for the other; and the ship in the course of the voyage be condemned as incapable of proceeding further; the insured may abandon for the ship, and not for the cargo (*e*). But if I insure the ship and cargo for one entire sum, and the ship be stranded, I cannot retain the goods, and abandon the ship (*f*).

The abandonment must be unconditional.

It must be simple and unconditional; otherwise it will not transfer the entire property to the insurers, which

(*a*) *Hodgson v. Blackiston*, at N. P. after Hil. 39 G. III. *Park* 172.—(*b*) *Vid. Valin* on art. 47, h. t. p. 102.—(*c*) *Valin* ubi sup. *Pothier*, h. t. n. 131.—(*d*) *Valin* ut sup. *Pothier*, n. 132.—(*e*) *Emerig.* tom. 2, p. 215.—(*f*) *Emerig.* tom. 2, p. 215.

is of the essence of the abandonment. If therefore I abandon a captured ship, on condition that in case she shall be released, she shall continue my property, and I shall repay with interest the sum which the insurers shall have paid me, such an abandonment would be void (a).

Sect. 4.

Of the Effect of an Abandonment.

BY the abandonment the insured, as we have already observed, yields up to the insurers, all his right, title, and interest in the ship or goods insured, or what may be saved of them, which, from the notice of abandonment, become the property of the insurers (b). It operates as a transfer to them, in proportion to their respective subscriptions, without any regard to the priority of the policies, if more than one (c); and though the ship or goods should appear, by the several policies, to be over-insured (d). And this transfer has a sort of retrospective relation in reference to the insurers, who, to the extent of the sum insured, are presumed to have been, from the beginning, owners of the things insured (e). *Quod repudiatur, retrò nostrum non fuisse palam est (f).*

The abandonment transfers the property saved to the insurers in proportion to their respective subscriptions.

And it relates back to the commencement of the voyage.

This principle is carried so far by the *French* law that, by the abandonment of a ship the insurer becomes intitled to all the freight she may have earned, freight being deemed an incident inseparable from the ship. *Emerigon* even goes the length of saying that it is inconsistent with the nature of the contract of insurance, that the owner should claim the freight of a ship, the value of which he has received from the insurer upon the abandonment.

In France the abandonment of the ship transfers the freight she has earned.

(a) *Valin*, art. 60, p. 133, art. 47, p. 103. *Emerig.* tom. 2, p. 194.—(b) *Vid. Le Guidon*, ch. 7, art. 1.—(c) *Emerig.* tom. 2, p. 194.—(d) *Vid. sup.* ch. 4, § 4, p. 115.—(e) *Emerig.* tom. 2, p. 196.—(f) *ff. Si quid in fraudem*, 1.

And he supports this opinion upon the ground that in the course of the voyage the value of the ship must necessarily diminish in nearly the same proportion as the freight increases; and consequently, that the value of the ship and freight at any given time in the voyage is only equal to the original value of the ship at the commencement of the voyage (*a*). But this notion could only have originated in the absurd supposition that a ship can earn no more freight, in any voyage, than is sufficient to re-instate her in the same situation she was in when she sailed on the voyage.

In England freight is insurable separately from the ship.

With us, however, freight is a matter insurable, as we have already seen, separately from the ship (*b*), and the abandonment of the ship does not transfer to the insurer the freight she has earned.

Where the insurance is for less than the value of the thing insured, the abandonment is in the same proportion.

But where the interest of the insured is not entirely covered by the insurance, he may abandon to the extent of the sum insured; for he is his own insurer for the residue.—Thus, if goods of the value of 5000 l. be insured only to the amount of 4000 l., and a total loss happen, the insured shall only abandon four fifths of what is saved; the remaining fifth will belong to himself (*c*); and he will be tenant in common, for that fifth, with the insurers.—The same rule holds where the cargo, by a new purchase during the voyage, is augmented in quantity.

If goods be partly insured, and money borrowed on respondentia for the residue; the insurer will have the legal title to what is abandoned, and the lender an equitable claim for his proportion.

So, where goods are only partly insured, and the owner has borrowed money on respondentia to the value of the residue; if he abandon, the insurer and the lender have a joint claim to what is saved, in proportion to their respective interests. But by the abandonment, the insurer is put in the place of the insured, and has the *legal title* to the effects saved, and the lender only an *equitable claim* to his proportion (*d*).

In France the claim of the lender is preferred to that of the insurer.

Yet, by the law of France (*e*), the claim of the lender, in such case, shall be preferred to that of the insurer,

(*a*) Vid. Emerig. t. 2, p. 221.—(*b*) Vid. sup. ch. 3, § 4.—(*c*) Emerig. torg. 2, p. 215, 237. Valin sur art. 47, h. t. p. 106.—(*d*) Vid. Emerig. t. 2, p. 234.—(*e*) Ord. mar. tit. *contrats à la grosse*, art. 18.

to the extent of his capital.—The reason of this preference is, that the lender contributes directly to the procuring of the goods; whereas the insurer is only a surety to protect the adventurer from the risk, without furnishing the thing put in risk. The lender has a substantial interest in the goods, and being in nature of a pawnee, has a sort of *lien* on them, which cannot be discharged by the transfer which the abandonment operates to the insurer. This only puts the insurer in the place of the insured; but the creditor and debtor can never have concurrent rights (a). *Emerigon* even goes so far as to say that the lender's claim ought to be preferred, even for the marine interest.—*Valin* (b) holds a contrary opinion, and argues to refute this reasoning of *Emerigon*, which was contained in a letter which he had received from *Emerigon* on this subject. *Emerigon*, however, in his book, supports his former opinion, and triumphs in this opinion being sanctioned by that of *Pothier* (c).

If there be three insurances; one on the *ship and cargo*; one on the *ship only*; and one on the *cargo only*; *Emerigon* (d) thinks that insurers on the *ship and cargo* have an equal claim on the effects saved, with the insurers on the *cargo only*, and that they have a like claim on the freight, and the remains of the ship, with the insurers on the *ship only*, in proportion to their respective subscriptions.—For example: If a ship be valued at 5000 l., the cargo 5000 l., total 10,000 l.; and these are insured by different policies, thus;

If there be three policies, one on the ship and cargo, one on the ship only, and one on the cargo only; how, in case of abandonment, the claims of the different sets of insurers upon the produce of the ship and goods abandoned shall, be adjusted.

| | | | £. |
|-------------------|---|---|--------|
| On ship and cargo | - | - | 3000 |
| On the ship only | - | - | 3000 |
| On the cargo only | - | - | 3000 |
| Uninsured | - | - | 1000 |
| | | | <hr/> |
| | | | 10,000 |
| | | | <hr/> |

(a) *Emerig.* tom. 2, p. 234, 235.—(b) *Valin*, tit. *contrats à la grosse*, art. 18.—(c) *Pothier*, *contrats à la grosse*, n. 49.—(d) *Tem.* 2, p. 246.

And he supports this opinion upon the ground that in the course of the voyage the value of the ship must necessarily diminish in nearly the same proportion as the freight increases; and consequently, that the value of the ship and freight at any given time in the voyage is only equal to the original value of the ship at the commencement of the voyage (a). But this notion could only have originated in the absurd supposition that a ship can earn no more freight, in any voyage, than is sufficient to inflate her in the same situation she was in when she failed on the voyage.

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Where the insurance is for less than the value of the thing insured, the abandonment is in the same proportion.

But where the interest of the insured is not covered by the insurance, he may abandon to the insurer of the sum insured; for he is his own insurer. Thus, if goods of the value of 5000 l. are insured only to the amount of 4000 l., and a total loss occurs, the insured shall only abandon four fifths of the sum insured; the remaining fifth will belong to himself. The same rule holds where the cargo is lost during the voyage, is augmented.

If goods be partly insured, and money borrowed on responsibility for the residue; the insurer will have the legal title to what is abandoned, and the lender an equitable claim for his proportion.

So, where goods are only partly insured, and the insured has borrowed money on responsibility for the residue; if he abandon, the insurer has a joint claim to what is saved, and the lender has a claim to the respective interests. But by the law of England the lender is put in the place of the insured as to the effects saved, and is entitled to his proportion (d).

In France the claim of the lender is preferred to that of the insurer.

Yet, by the law of England, in such case, shall be

(*) Vid. *Encyclopædia*
(c) *Encyclopædia*
p. 106.
Encyclopædia

loss, they, and not the insured, are the real sufferers.—This will appear by the following case.

The King granted letters of reprisal against the *Spaniards*, for the benefit of his subjects, in consideration of the losses they had sustained by unjust captures. The commissioners appointed to distribute the produce of these reprisals among the sufferers, would not permit the *insurers*, but the *owners* only, to make claim to the parts of the prizes allotted to the sufferers, although the owners were already satisfied for their loss by the insurers, who thereupon brought their bill in *Chancery*.—Lord *Hardwicke*, C. decreed in favour of the insurers.—He said ;—“ The person originally sustaining the loss was the owner ; but, after satisfaction made to him, the *insurer*. No doubt but, from that time, as to the goods themselves, if restored *in specie*, or compensation made for them, the insured stood as a trustee for the insurer, in proportion to what he paid ; although the commissioners did right to avoid being entangled in accounts, and in adjusting the proportion between them. Their commission was limited in time ; they saw who was owner ; nor was it material to them to whom he assigned his interest, as it was in effect after satisfaction made.”

Reprisals were made on the *Spaniards* to indemnify the sufferers by unjust captures : The insurers, who have paid the owners the losses sustained by those captures, shall stand in their place, and receive their proportion.

Randel v. Cockran, in Chan. 1748. 1 Ves. 98.

If, upon a total loss happening, the ship be abandoned, but she afterwards arrive safe ; this shall not avoid the abandonment. On the one hand, the insurers shall take to their own use all the profit of the voyage ; and the insured is entitled to nothing, except for so much as he was uninsured (*a*). On the other, they shall not, on account of the safe arrival of the ship, refuse to pay the sum insured.—As if, upon a capture, the insured abandon, and the ship be afterwards released, or otherwise recover her liberty ; the insurers shall nevertheless satisfy the insured as for a total loss : But then they are entitled to all the benefit of the voyage (*b*).

If the ship, after abandonment, arrive safe, the insurer shall have all the profit of the voyage.

(*a*) *Le Guidea*, ch. 7, art. 12.—(*b*) *Emerig. tom. 2, p. 197.*

But they cannot compel the insured to take back the thing insured, and refund the money.

A total loss is paid on a quantity of bullion, which is afterwards recovered by the insured: The insurer cannot recover back more than his proportion of the value of it, after deducting the expence of salvage.

Da Costa v. Frith, 4 Bur. 1966, sup. 108.

So, if the ship or goods insured happen to be recovered undamaged, after the insurer has paid a total loss; the following case will shew that he cannot compel the insured to refund the money, and take back the ship or goods; but the insurer shall stand in his place, and shall have the benefit of salvage.

An insurance was made, "Upon any of the packet-boats that should sail from *Lisbon* to *Falmouth*, for one year, upon any kind of goods; such goods to be valued at the sum insured on the packet-boat, without further proof of interest than the policy; and to make no return of premium for want of interest, being on bullion or goods."—The defendant, who was one of the insured, had an interest in bullion on board the *Hanover* packet, on a voyage from *Lisbon* to *Falmouth*. The ship was totally lost off *Falmouth*; and the loss was adjusted at 100 l. *per cent.*; but by a memorandum on the policy, the insured agreed that,—"*Should any salvage* thereafter be recovered, he would refund to the insurers, *whatever he might so recover*, in such proportion as the sum insured bore to the whole interest;" and the insurer accordingly paid the whole sum insured.—An iron trunk, which contained all the bullion, was afterwards fished up, and the bullion recovered, without any loss or prejudice whatever, and delivered to the insurer. The expence of salvage amounted to 63 l. 8 s. 2 d.—The insurer, upon this, brought an action against the insured for money had and received, to recover back the amount of his subscription. The defendant (the insured) paid into court 48 l. 4 s., being the plaintiff's proportion of the value of the bullion recovered, after deducting the expence of salvage.—On the part of the plaintiff (the insurer) it was contended that by the recovery of the bullion, the contract was performed on the part of the insurers, and that the loss could only be considered as a partial loss, viz. the amount of the salvage; and that the agreement to allow the insurer in the proportion of the sum insured to the whole interest, made no difference.—But the court were unanimously of opinion that the insurer

insurer was not entitled to recover back the money he had paid to the insured, but only his proportion of the value of the goods saved, after deducting the expence of salvage, which was the sum paid into court.

An abandonment once properly made, upon a sufficient ground, and accepted by the insurers, is absolute and binding upon both parties; nor can it be revoked but by mutual consent (a). *Emerigon* says, that if a ship, by reason of sea-damage, be condemned as incapable of proceeding on her voyage, and the insured abandon; but the ship, being refitted, is brought home at the expence of the insurers; the insurers cannot compel the insured to take her back, but must pay the total loss (b).—*Valin* holds a contrary opinion, and says that if the insurers have not voluntarily paid the sum insured, they may, in such case, oblige the insured to take back the ship; the only question between them being, as to the amount of the partial loss (c). The opinion of *Emerigon* seems to be founded on the best reasoning.

An abandonment once properly made is irrevocable.

But the abandonment is irrevocable only where it is made upon a sufficient ground: And, therefore, if it appear to have been made upon a partial, and not a total loss; or upon information that proves false or unfounded, it will be void *ipso jure*. *Nam recte revocari, rescindi, et retrahi dicitur, quod ipso jure nullum est* (d).

But if it be not upon a sufficient ground, it will be void.

(a) *Pothier*, h. t. n. 138. *Emerig.* tom. 2, p. 197.—
 (b) *Emerig.* tom. 2, p. 195.—(c) *Valin*, on art. 60, h. t. p. 144.—
 —(d) *Vid. Emerig.* tom. 2, p. 197.

Sect. 5.

Of the ordering and disposal of the Effects abandoned.

In case of misfortune, the insured is bound to use his endeavours to save as much as possible.

IN case of shipwreck or other misfortune, the effects that are saved continue, till abandonment, the property of the insured, who is bound in justice, honour, and conscience, to use his utmost endeavours to make the most of what may be rescued from destruction; in order, as much as possible, to lighten the burthen of the insurers. To enable him to do this, without prejudice to his right of abandonment, our policies provide that, in case of any loss or misfortune to the insured, their factors, servants, and assigns, shall be at liberty to sue, and labour about the defence, safeguard, and recovery of the goods and merchandizes and ship, &c. without prejudice to the insurance; *to the charges whereof, the insurers agree to contribute, each according to the rate and quantity of his subscription.* The meaning of this clause is, that, till the insured has been informed of what has happened, no act of the captain shall prejudice their right to abandon (a). There is a similar provision in the policies of all other commercial countries, with a similar undertaking on the part of the underwriters, to defray all expences, without limit, except in the policy used at *Mar-seilles*, in which the insurers only undertake to defray all expences occasioned by the salvage, *provided they do not exceed the value of the effects saved*; a precaution, as *Emerigon* observes, which prevents their being ever liable for more than the sum insured (b). This accords with the sentiments of *Cleirac*, who says that the expences of the

(a) Per *Ashurst*, J. in *Mitchell v. Edie*, sup. 509.—(b) Vid. *Emerig.* tom. 2, p. 205.

recovery of the effects saved, ought not to increase the loss beyond the sum insured (a). But this restriction has occasioned many inconveniencies both to the insured and insurers (b), which is the reason, perhaps, why it has not been adopted in any other place that I know of.

As to the captain, the ship and cargo being confided to his care, it is peculiarly his duty, in order that he may shew himself worthy of so great a trust, to employ all his courage, skill, and industry, in the protection and preservation of the one and the other.

Duty of the captain in the care of what may be saved.

From the nature of his situation, he has an implied authority, not only from the insured, but also from the insurers and all others interested in the ship or cargo, in case of misfortune, to do whatever he thinks most conducive to the general interest of all concerned; and they are all bound by his acts (c). Therefore, if the ship be disabled by stress of weather, or any other peril of the sea, the captain may hire another vessel for the transport of the goods to their port of destination, if he think it for the interest of all concerned that he should do so. Or he may, upon the loss of the ship, invest the produce of the goods saved in other goods, which he may ship for his original port of destination; and this, according to the doctrine of Lord Mansfield and Mr. Justice Buller, in the case of *Plantamour v. Staples* (d), shall bind the insurers. For whatever is recovered of the effects insured, the captain is accountable to the insurers. If the insured neglect to abandon when he has it in his power to do so, he adopts the acts of the captain, and he is bound by them. If, on the other hand, the insurers, after notice of abandonment, suffer the captain to continue in the management, he becomes their agent, and they are bound by his acts (e).

His power.

(a) *Cleirac sur Le Guidon*, ch. 20, art. 9.—(b) *Vid. Emerig. tom. 2, p. 205.*—(c) *Per Lord Mansfield in Mills v. Fletcher, Sup. 498.*—(d) *Vid c. 11, § 2, sup. 377.*—(e) *Per Ashurst, J. in Mitchell v. Edis, sup. 509.*

Duty of the
sailors.

As to the *sailors*,—when a misfortune happens, they are bound to save and preserve the merchandize to the best of their power; and while they are so employed, they are entitled to wages, so far at least as what is saved will allow: But if they refuse to assist in this, they shall have neither wages nor reward. In this the *Rhodian* law (a), and the laws of *Oleron* (b), of *Wifbury* (c), and of the *Hanse Towns* (d), all agree.

(a) Leg. Rhod. art. 3 — (b) Art. 3. — (c) Art. 15. —
(d) Art. 44.

CHAP. XV.

*Of the Adjustment of Losses.**Preliminary Observations.*

THE adjustment of a loss is the settling and ascertaining the amount of the indemnity which the insured, after all allowances and deductions are made, is entitled to receive under the policy, and the fixing the proportion of this, which each underwriter is liable to pay. To ascertain with due precision the amount of a loss is sometimes a work of considerable difficulty: And though this is generally performed, without litigation, by persons conversant with this branch of business; yet questions sometimes arise upon which the most experienced merchants cannot agree, and then the law must draw the line between them.

By the law of *England*, as it now stands, as well as by the general law of merchants, the contract of insurance ought not to be lucrative to the insured, nor enable him to make a profit out of the loss of another. It ought merely to afford him an indemnity, and no more (a). The insurer ought never to pay less, nor the insured receive more, than that which a fair indemnity demands. And this should be ascertained, not upon subtleties and niceties, but upon plain and easy rules, the dictates of common sense, drawn from the truth of the case.

In adjusting a loss, the first thing to be considered is, how the *quantity of the damage* for which the underwriters are liable, shall be ascertained. This being known, the next, and generally the most difficult, point to be settled, is, by what rule this shall be *appreciated*. When these things are satisfactorily ascertained, the adjustment is

(a) Vid. *Li Guidon*, ch. 2, art. 12, *Emerig.* tom. 1, p. 259.

usually indorsed on the policy and signed by the underwriters. We will therefore consider,

1. How this quantity of damage shall be ascertained;
2. How the loss shall be appreciated;
3. The effect of an adjustment.

Sect. 1.

How the Quantity of Damage shall be ascertained.

In case of a total loss, where the insured abandons, how the loss shall be adjusted.

WHEN a loss has happened, the insured ought to inform himself whether it be total, or partial; and if, under all the circumstances, it appear to be a total loss, and he decide to abandon, he must give notice of this to the underwriters in a reasonable time, otherwise, as we have already seen (*a*), he will waive his right to abandon, and must then be content to claim only as for a partial loss.

If the policy be a valued one, and the loss total.

When the loss is admitted to be total; and the policy is a *valued* one, the insured is entitled to receive the whole sum insured, subject to such deductions as may have been agreed by the policy to be made in case of loss. For the insured, by allowing the value to be inserted in the policy, agrees that it shall be taken as there stated; and it is the same as if he had admitted it at the trial of the cause (*b*).

Difference between an open and a valued policy, as to the adjustment of a loss.

It is only in the case of a total loss that there is any difference between an open and a valued policy. Upon the latter, the value is admitted, and the insured has only to prove, if the insurance was on goods, that the goods valued were on board. Upon an open policy, it is not only necessary to prove that the goods were on board, but also the *value* of them; which value, not exceeding the sum insured, is the sum the insurers are bound to pay.

But in the case of a *partial loss*, the like inquiry is to be made into the amount of the loss, whether the policy be of the one sort or of the other (*c*). The indemnity

(*a*) Sup. 509, 510.—(*b*) Vid. sup. 199.—(*c*) 2 Bur. 1171. Vid. sup. 203.

secured by either sort of policy is, that if the thing insured do not come safe to the port of destination, but is lessened in value by damage received in the voyage, the loss shall be borne by the insurer.

When the loss consists in the *total loss* of one entire individual, parcel of the goods insured, and this is capable of a several and distinct valuation; as if, out of 100 hogshheads of sugar, ten happen to be lost, and the rest arrive safe; the insurer must pay the value of the ten (*a*).

Rule, where the loss consists of one entire individual, capable of a several valuation.

When a part of the goods insured is saved, and this exceeds the amount of the freight, the practice is to deduct the freight from the salvage, and to make up the loss upon the difference. But where the freight exceeds the salvage, then it is a total loss (*b*).

When part of the goods is saved.

But where the goods insured are damaged in the whole or in part, it becomes necessary to ascertain the *quantity* of such damage, which is done by taking the value of the goods, in their damaged state, from the prime cost, and the remainder will be the amount of the loss.

Where all the goods are damaged.

If several articles be insured for one entire sum, but with a distinct valuation to each, and only one be put in risk: If that one be lost, the insured shall recover such a proportion of the sum insured as the value of that article bore to the value of the whole.

Where several articles are insured, and only one put in risk.

As, where the plaintiff wrote from *St. Kitts* to his agent in *London*, desiring him to make insurance on a ship and cargo to the amount of 5500*l.* valuing the ship at 1500*l.* Only 600*l.* could be effected. No part of the cargo was ever put on board, so that in fact the policy attached only on the ship.—The ship being lost, and an action brought on the policy, the above rule was contended for on the part of the defendant.—Lord *Kenyon*, who tried the cause, seemed to be of opinion that, as the whole sum insured was less than the value of the ship, the plaintiff was entitled to the whole.—But the jury having intimated that the rule as laid down by the defendant's counsel was

Amery v. Rogers,
Esp. Rep. 207.

(a) 2 Bur. 1170.—(b) Vid. *Boyfield v. Brown*, sup. 507.

that which prevailed in such cases at *Lloyd's* coffee house; his lordship assented to their giving a verdict for such a proportion of the sum insured as the value of the ship bore to the value of both ship and cargo.

When there is a clause to be free of average under so much *per cent.* how that proportion shall be ascertained.

If there be a clause in the policy, to be free of average from a particular risk, under so much *per cent.* and a loss occasioned by that risk takes place; the proportion which the loss bears to the cargo, must be calculated upon the cargo which was on board when the loss happened, not upon that which was on board at any other time.

Rhol. v. Parr,
Esq. Rep. 444,
Sup. 419.

Thus:—In a policy on a slave ship, there was a memorandum, to be free of average under 5 *per cent.* for loss by insurrection of the slaves.—An insurrection took place when there were only 49 slaves on board. Seven of these were killed.—As this loss must amount to 5 *per cent.* to make the underwriters liable, it became a question, at what time the proportion which the loss bore to the cargo should be taken;—whether at the time when the insurrection took place and the loss happened, or when the whole cargo was on board. Upon examination of persons acquainted with the practice in such cases, it was found that the time when the calculation was to be made, was, *when the loss happened*, at which time the proportion of the loss to the cargo then on board was to regulate the loss to be borne by the underwriters.

Sect. 2.

How the Loss shall be appreciated.

THE true price of any thing is that for which things of the like nature and quality are usually sold in the place where they are situated, if real property; or in the place where they are exposed to sale, if personal (a).

The first price is not always the true value.

The first price of a thing does not always afford a sure criterion to ascertain its true value. It may have been bought very dear, or very cheap. The circumstances of

(a) *Portier, des ventes*, n. 342.

time and place cause a continual variation in the price of things. For this reason, in cases of general average, the things saved contribute, not according to the prime cost, but according to the price for which they may be sold at the time of settling the average. *Non quanti emptæ sunt, sed quanti veniri possunt*, is the rule of the *Rhodian law* (a). The same is adopted in the laws of *Wifbuy* (b).

Averages are settled according to the price at the time of settling.

Upon the subject of the valuation of the goods insured there has always been a great diversity of opinion, not only among speculative writers, but also among merchants themselves. Some contending for the prime cost, others for the current price at the time of the loss; some insisting on the price at the time and place where the goods are shipped, others on the price at the port of discharge (c).

Different modes of appreciating a loss.

In *France*, where almost all policies are valued, the insured has his election to fix the previous valuation, either at the prime cost, or at the current price at the time and place of loading. If the goods be of the growth or manufacture of the insured, the latter valuation is always adopted (d). The same rule that applies to goods, applies also to the ship, which is always valued at the sum she is worth at the time of her departure (e), or at least at the commencement of the risk.—If goods, by being brought from a distance, are augmented in value, they may be estimated at their improved value, and an invoice made accordingly; nor shall the insured be obliged to produce his original accounts, having a right to insure the profit already acquired; and the insurer must either abide by the invoice made by the insured, or require a valuation by skilful persons according to the *current prices of the time and place*.—It is usual in *France* to stipulate in the policy that the ship shall remain of the same value during the voyage; which is the reason why *Valin* (f) says that where

How the valuation is made in *France*.

Goods brought from a distance may be valued at their improved price.

(a) ff. *Leg. Rhod.* l. 2, § 4.—(b) *Laws of Wifb.* art. 20, and 39. Vid. *Santerna*, h. t. par. 3, n. 40. *Roccus*, n. 31.—(c) Vid. *Emerig.* tom. 1. p. 261.—(d) Vid. *Ord. de la mar.* h. t. art. 64, and *Valin* on this art. *Emerig.* tom. 1, p. 262.—(e) Vid. *Emerig.* tom. 1, p. 263.—(f) On art. 8 and 64, p. 56, 135.

the ship is abandoned, the *freight*, which augments in the same degree as the ship is depreciated in value during the voyage, is also abandoned, as being an inseparable incident to the ship (a).

In England the proper value consists of the prime cost and all charges.

The value is never affected by the rise or fall of the market, nor by the course of exchange.

In England, if the policy be an open one, it is an invariable rule to estimate a total loss, not by any supposed price which the goods might have been deemed worth at the time of the loss, or for which they might have been sold, had they reached the market for which they were destined; but according to the *prime cost*; that is, the invoice price, and all duties and expences till they are put on board, together with the premium of insurance. This is the only true, at least the only legal, mode of estimating a loss, whether total or partial, on goods; and therefore, whether the goods would have arrived at a good or a bad market is always immaterial (b). Neither is the difference of exchange to be at all regarded in the adjustment; for the underwriter does not insure against any loss arising from such causes (c).

It might, with some degree of plausibility, be insisted that the prime cost, after a long voyage, and when the goods insured had almost reached a market where they would have sold for a great profit, does not amount to an *indemnity*; for, beside the loss of the profit the merchant might reasonably have expected, he also loses all the benefit he could have derived from the use of his money in any other adventure. Upon this principle the *Consolato del mare* (d), in laying down rules for average contributions, declares, that if the goods be lost before half the voyage is performed, they are to be valued only at prime cost; but, if after, then at the price at which they might have been sold at the port of delivery.—However reasonable this rule may be, abstractedly considered, it would be more than counter-balanced by the litigation it would occasion, to decide whether the voyage was half per-

(a) Vid. sup. ch. 14, § 4.—(b) Per Buller J. at N. P. in *Dick v. Allen*, after Mich. 1785, *Park* 104.—(c) Per Lord Kenyon in *The Hiffon v. Bewick*, at N. P. *Esq. Rep.* 77.—(d) Ch. 95.

formed, or if that were indisputable, then what was the market price at the port of delivery. But, be this as it may, it is the invariable rule in this country, upon an open policy to estimate a total loss upon goods, by adding to the prime cost all duties and expences and the premium of insurance; for this has constantly been deemed a full indemnity to the insured.

A ship is valued at the sum she is worth, at the time she sails on the voyage insured, including the expences of repairs, the value of her furniture, provisions and stores, the money advanced to the sailors, and, in general, every expence of the out-fit, to which is added the premium of insurance (a).

How a ship shall be valued.

A partial loss upon either ship or goods, is that proportion of the prime cost, which is equal to the diminution in value occasioned by the damage. In the following case, which arose upon a valued policy upon goods, it was determined that the diminution in value, was that proportion of the value, in the policy, which the difference between the price of the sound, and the price of the damaged, bore to the price of the sound in the port of delivery.

How damage to goods shall be estimated.

An insurance was made upon goods, "At and from the Island of *St. Thomas* to *Hamburg*, from the loading at that island, till the ship should arrive and land the goods at *Hamburg*."—The goods which consisted of sugars, coffee, and indigo were valued; the clayed sugars at 30 l. per hoghead, *Muscovado* at 20 l.; and the coffee and indigo were also valued. Sugars were as usual, warranted free from average under 5 l. *per cent.* and all other goods under 3 l. *per cent.* unless general, or the ship should be stranded.—In the voyage the sea water got in; and when the ship arrived at *Hamburg*, it appeared that every hoghead of sugar was damaged; so that it became necessary to sell them immediately at *Hamburg*: And the difference between the price they sold for, and what

Sugars valued at 30 l. per hoghead are so damaged in the voyage, that they are sold at the port of delivery, for 20 l. 0 s. 8 d. per hoghead, but, if sound, would have fetched 23 l. 7 s. 8 d. so that the difference was 3 l. 7 s. per hoghead. The loss in this case, is that proportion of 30 l. (the value in the policy) which 3 l. 7 s. (the difference between damaged and sound at the port of delivery) bears to 23 l. 7 s. 8 d. the price of the sound at the port of delivery. —The amount of the loss does

(a) By the ord. de la mar. h. t, art. 20, the premium cannot be added to the other charges, yet the allowance of it is supported by the authority of *Le Guidon*, ch. 2, art. 9, ch. 15, art. 3, 13, 15, and the practice of all commercial nations.

not depend on the prices in the market at the port of delivery: But the proportion of the *prime cost* which the loss amounts to, may be ascertained by the prices which the damaged and sound bear to each other in the port of delivery.

Lewis v. Rucker,
2 Bur. 1167.

they would have fetched there, had they been sound, was 25 20 l. 0 s. 8 d. per hoghead, is to 23 l. 7 s. 8 d. That is, they were sold for 3 l. 7 s. per hoghead less than they would have been worth, had they been sound.—The defendant paid into court the like proportion of the sum at which the sugars were *valued in the policy*, as the price of the damaged bore to that of sound sugars at *Hamburg* (a).—The only question was by what measure or rule the damage ought to have been estimated.—The plaintiff proved that, at the time of the insurance, sugars were worth 35 l. per hoghead at *Hamburg*; but that the expectation of a peace had suddenly sunk the price. That the owner of the sugars, before the ship arrived at *Hamburg*, and before he could know that they were damaged, had sent orders that they should be housed there till the price should rise above 30 l. per hoghead: That, in fact, the negotiation not taking place, sugars did not rise 25 l. per cent. That he might have sold these sugars at 30 l. per hoghead, if they could have been kept; and the damage they had received was the only reason why they were not kept. The plaintiff, therefore, insisted that the necessity of an immediate sale, and the loss sustained by it, ought to have been taken into the account in computing the damage.—Lord *Mansfield*, who tried the cause, left it to the jury to decide, *whether the difference between*

(a) The reporter in this case makes Lord *Mansfield* state that the sum paid into court bore the like proportion to the sum at which the sugars were valued in the policy, (30 L.) as the price of the damaged sugars (20 l. 0 s. 8 d.) bore to the price of the sound at *Hamburg* (23 l. 7 s. 8 d.). That is, the sum supposed to have been paid into court, was to 30 l. as 20 l. 0 s. 8 d. is to 23 l. 7 s. 8 d. This, by a common operation of arithmetic, would be 25 l. 14 s. per hoghead, which shews that the rule by which the money was paid into court, is not correctly stated in the report. The sum paid into court must have borne the same proportion to 30 l. as 3 l. 7 s. (the difference between the sound and damaged sugars at *Hamburg*) bore to 23 l. 7 s. 8 d. (the price of the sound there). This comes to 4 l. 5 s. 11 d. per hoghead, the real amount of the loss, according to the principles laid down by Lord *Mansfield*, in delivering the opinion of the court,

the

the sound and the damaged sugars, at the port of delivery, ought to be the rule : Or, whether the loss occasioned by an immediate sale, should be taken into consideration. The jury, amongst whom were many considerable merchants, who perfectly understood the subject, and formed their judgment from their own experience, found the defendant's rule of estimation to be right, and gave their verdict for him accordingly.—Upon a motion for a new trial, the court were unanimously of opinion that the plaintiffs were not entitled to have the price for which the damaged sugars were sold, made up to 30 l. per hoghead; and that the rule by which the jury had gone was the right measure.—Lord Mansfield, in delivering the opinion of the court, said,—“The rule by which the defendant and the jury have gone is this,—the defendant takes the proportion of the difference between sound and damaged sugars in the port of delivery, and pays that proportion upon the value of the goods specified in the policy; and has no regard to the price, *in money*, which either sound or damaged sugars bore at the port of delivery. He says the proportion of the difference is equally the rule, whether the goods came to a rising or a falling market. For instance; suppose the prime cost or value in the policy to be 30 l. and the damaged goods sell for 40 l.; but, if sound, would have sold for 50 l.; the difference is a fifth: The insurer must therefore pay a fifth of 30 l.:—*E converso*, if they come to a losing market, and, being damaged, sell for 10 l.; but, if sound, would have sold for 20 l.; the difference is one half: The insurer must therefore pay 15 l. that is half the prime cost or value in the policy. Two objections have been made to this rule: *First*, that it is going by a different measure in the case of a *partial*, from that which governs in the case of a *total*, loss; for, upon a total loss, the prime cost, or value in the policy, must be paid.—The answer to which objection is, that the distinction is founded in the nature of the thing. Insurance is a contract of indemnity against the perils of the voyage, to the amount of the value in the policy; and therefore if the thing be totally lost, the insurer must pay the

This rule equally holds whether the goods come to a rising or a falling market.

the whole value which he insured at the out-set. But, where a *part* of the commodity is spoiled, no measure can be taken from the prime cost to ascertain the quantity of the damage sustained. The only way is to ascertain whether the thing be a third or a fourth worse than the sound commodity; and then pay a third or fourth of the prime cost or value of the goods so damaged (*a*). The second objection is, that this being a valued policy, was in nature of a *wager*; and if so, there could be no *partial* loss, and the insured could only abandon and recover as for a total loss; because the value specified was fictitious." —In answer to this objection, his Lordship said,—"To argue that there can be no adjustment of a partial loss upon a valued policy, is directly contrary to the very terms of the policy itself. It is expressly provided that the article of *sugar* shall be subject to *average*, if the loss exceed 5 *per cent.*; and even if it were not subject to average, the consequence would be that every partial loss must thereby become total: But then, the insured could only recover in the event of a total loss; and consequently the plaintiffs in this case would not be entitled to recover at all; for there is no colour to say that this was a total loss; besides the plaintiffs have taken the goods and sold them. In opposition to the measure which the jury have gone by, the plaintiffs contend that they ought to be paid the *whole value in the policy*, upon one of two grounds. 1st. That the general rule of estimating should have been the difference between the price the damaged goods sold for, and the prime cost, or value in the policy. Here the da-

(a) Lord *Mansfield*, in this answer to the first objection, seems, according to the report, to have been labouring to account for the supposed difference between the measure in the case of a partial and a total loss. But with great deference, it would seem that the rule to which the objection is made, and which fixes the proportion of the *prime cost* which must be paid in case of a partial loss, is not inconsistent with, but is founded upon, the practice of paying the whole of the prime cost upon a total loss.

amaged goods sold for 20 l. 0 s. 8 d. per hoghead ; and the underwriters should make it up 30 l.—To this I answer, that it would involve the underwriter in the rise or fall of the market ; and, in some cases, subject him to pay vastly more than the loss ; in others, it would deprive the insured of any satisfaction, though there were a loss.—For instance ; suppose the prime cost, or value in the policy, 30 l. per hoghead ; the sugars damaged ; the price of the sound 20 l. ; the price of the damaged 19 l. 10 s. : The loss is about a *fortieth*, and the insurer would be obliged to pay above a *third*.—Suppose they come to a rising market ; the sound sugars sell for 40 l. ; the damaged for 35 l. : The loss is an *eighth* ; yet the insurer would have to pay nothing.—The 2d ground upon which the plaintiffs contended that the 30 l. should be made up, was, that it appeared that the sugars *would* have sold for that price, if the damage had not made an immediate sale necessary.—The moment the jury brought in their verdict, I was satisfied they had done right in disregarding the *particular circumstances* of this case ; and I was convinced of this, after conversing with persons of experience in adjustments, and after the subject had been fully argued at the bar. The nature of the contract is that the goods shall come safe to the port of delivery ; or if not, that the insurer will indemnify the insured to the amount of the prime cost. If they arrive, but lessened in value by damage received at sea, the nature of an indemnity speaks demonstrably, that it must be, by putting the insured in the same situation, (relation being had to the prime cost, or value in the policy), which he would have been in, if the goods had arrived free from damage ; that is, by paying such *proportion*, or *aliquot part*, of the *prime cost*, or value in the policy, as corresponds with the proportion, or aliquot part, of the *diminution in value* occasioned by the damage. The duty accrues upon the ship's arrival and landing her cargo at the port of delivery ; and the insured has then a right to demand satisfaction. The adjustment can never depend upon future events or speculations :

An insurer is never to be involved in the rise or fall of the market.

The indemnity secured by the policy is such an aliquot part of the prime cost as corresponds with the diminution in value occasioned by the damage.

The duty accrues upon the ship's arrival and landing her cargo ; and does not depend on future contingencies.

No speculation of the insured can increase or diminish the amount of the loss.

Observations on the above case, and that which follows.

If the value in the policy exceed the interest of the insured, the loss is adjusted in the same manner as if the policy were an open one; and the computation

speculations: How long is he to wait; a week, a month, or a year?—In this case, the price rose; but, if peace had been made, the price would have fallen: But the defendant did not insure that there should be no peace. It is true that the owner acted upon political speculation, and ordered the sugars to be kept till the price should be 30 l. or upwards: But no private scheme or project of trade of the insured can affect the insurer: He knew nothing of it: He did not undertake that sugars should bear a price of 30 l. a hoghead. If speculative distinctions of the merchant, and the success of such speculations, were to be regarded, it would introduce the greatest injustice and inconvenience. The insurer knows nothing of them. Here, the orders were given after the signing of the policy. But the decisive answer is, that the underwriter has nothing to do with the price, and that the right of the insured to a satisfaction, where goods are damaged, arises immediately upon their being landed at the port of delivery."

In this case, which I have abstracted more fully than usual, the insurance was on goods which were valued in the policy, but whose real value depended, at the time the insurance was effected, on a fluctuating market. The goods which were damaged in the voyage, came to a fallen market, where the price was less than the value in the policy. The insured insisted on being paid the difference between the price for which the goods were sold in the port of delivery, and the *value in the policy*. But it was determined that he was only entitled to the proportion of the value in the policy which their diminution in value bore to the price of sound goods, of the same sort, in the port of delivery; thus using the relative prices of the sound and damaged goods at the port of delivery as the means of ascertaining the proportion of the *prime cost* which the insurer was bound to pay.

In the following case, which came before the court of King's Bench many years afterwards, there was a partial loss upon a valued policy, but the value in the policy *exceeded the interest of the insured*. There, Lord Mansfield and the other judges of the court declared, that it was the constant usage in

in such cases, to adjust a partial loss in the same manner as if the policy were an open one; and that the computation must therefore be by the *real interest* on board, and not by the value in the policy.

must be made by the real interest on board, not by the value in the policy.

That was an insurance on a ship and goods on board,—“At and from *Omoa* to *London*; valued at the sum insured.” There was no value mentioned in the body of the policy, but only the sums wrote against the different names on the back. There were other policies on the same ship and goods, amounting in the whole to 99,500 l. which exceeded the amount of the interest of the insured (*a*). The ship and a great part of the cargo were lost, about one tenth only of the goods being saved. One question at the trial of this cause was, how the loss, which was considered as a partial one, should be adjusted (*b*). The broker swore that, on such policies as this, where a *total loss* happened, the whole sum was paid: But where it was only a partial loss, they considered it as an open policy, and paid a proportion, not of the sum insured, but of the value of the goods.—The court of King’s Bench, when this came before them, thought it, at first, like the case of *Lewis v. Rucker* (*c*). But the interest of the insured, in the ship and goods, being less in value than the sum insured, the court held, that this case differed from that of *Lewis v. Rucker*, and that the constant usage in such cases was, upon a total loss, to pay the whole (*d*); but, upon a partial loss, to consider it as an *open policy*. The court were therefore of opinion that the computation in this case must be by the *real in-*

Le Gros v. Hughes, B. R. E. 22 G. III. MS.

(*a*) The ship and goods insured had been captured by sea and land forces jointly. The insurance was on behalf of the officers and crews of the ships; but as the land forces were entitled to a share in this prize, the interest of the insured was therefore less than the value of the ship and goods, and less than the sum insured. Vid. sup. 84, 111.—(*b*) The principal question was, whether the insured had an insurable interest in the ship and goods. For this vid. sup. 84, where there is a fuller report of this case.—(*c*) Sup. 535.—(*d*) Vid. sup. 199.

interest

loss of the insured on board, and not by the value in the policy.

The true ground of distinction between this case and that of *Lewis v. Rucker* is, that, in that case, the value in the policy was considered as the *prime cost*, and this was never disputed; whereas, in this case, it appears that the interest of the insured was considerably less than the value in the policy.

Sect. 3.

Of the Effect of an Adjustment.

An adjustment signed by the underwriters is *prima facie* evidence against them, and sufficient of itself, if not impeached, to entitle the insured to recover without any other proof.

AN adjustment being indorsed on the policy and signed by the underwriters, with a promise to pay in a given time, is *prima facie* evidence against them, and amounts to an admission of all the facts necessary to be proved by the insured to entitle him to recover in an action on the policy. It is like a note of hand, and being proved, the insured has no occasion to go into proof of any other circumstance. This was the opinion of Lord C. J. Lee in the following case.

Hog v. Gouldney,
at N. P. after
Trin. 1745, at
G. H. Beawes
310.

An insurance was made on a ship "At and from Jamaica to London, interest or no interest, and without benefit of salvage, with a warranty that the ship should sail with convoy."—The ship sailed with convoy, but was so much damaged in the voyage, that she was obliged to bear away for *Charleston*, where she was condemned and broke up.—All the underwriters, being satisfied of the truth of this case, paid their losses, except the defendant, who went so far as to settle it, and according to the custom upon such occasions, indorsed the policy in these words;—"Adjusted the loss on this policy at 98l. *per cent.*, which I agree to pay one month after date. *London, 5th July 1745. Henry Gouldney.*"—When the money became due, he insisted on fuller proof, particularly of the ship's sailing with convoy, and her condemnation.—An action was brought on the policy; and Lord C. J. Lee, who tried the cause, was of opinion that

that this was to be considered as a note of hand; and that the plaintiff had no occasion to enter into the proof of the loss. The jury found a verdict for the plaintiff.—The same rule was followed, the next year, by the same learned judge, in the case of *Hewett v. Flexney* (a).

It has been observed that the words used by Lord Chief Justice *Lee*, in this case, were *extremely large* (b); and that the true rule upon the subject might be better collected from two subsequent cases, which will be mentioned hereafter. The words which are supposed to be too large are, "That the memorandum indorsed on the policy, was to be considered as a note of hand, and that the plaintiff had no occasion to enter into the proof of the loss."—It is not easy to discover in what respect the rule here laid down is too large. The memorandum indorsed on the policy, and signed by the defendant, unquestionably amounts to an admission of his subscription to the policy, of the plaintiff's interest in the ship insured, (if the terms of the policy had not rendered that unnecessary), of her having sailed with convoy, of a loss having happened, and that the amount of that loss was the sum specified in the adjustment, which contains a promise to pay in one month. This, like a note of hand, is *prima facie* evidence of a debt; and it seems to be as unnecessary for the plaintiff, in an action on the policy, to prove the facts admitted by the adjustment, as to prove the consideration of a note of hand, before it is impeached.—But in neither case is "the door shut against inquiry." A note of hand is not *conclusive* evidence of a consideration, though value received be expressed in it. On the contrary, it may be impeached by shewing that it was made upon an unlawful, or corrupt consideration, or without any consideration at all. So, an adjustment, like that which is stated in the foregoing case, may be impeached by shewing that the underwriter was induced to sign it by some fraud or concealment, or by some misconception of the law or fact. But, in either

This rule objected to.

The rule vindicated. The adjustment admits the whole case, and like a note of hand, is *prima facie* evidence of a debt.

It is not, however, conclusive, but may be impeached by evidence.

(a) *Beaves* 308.—(b) *Park* 118.

case, this must be done by *evidence*, and not by *doubts* or *surmises* after the time for payment is come; nor can the plaintiff be put under the necessity of proving the consideration of the note, in the one case, or the facts admitted by the adjustment, in the other, until a strong ground of suspicion, at least, be raised against it by *evidence* on the part of the defendant.

The adjustment may be given in evidence in an action on the policy; and the insured is not obliged to declare especially on it.

It is *prima facie* evidence against the underwriter, but he may impeach it.

Rodgers v. Mayor, at N. P. after Trin. 1790, Park 118.

In the first of the two cases adduced in support of the objection to the rule, as laid down by Lord C. J. *Lee*, a loss had been adjusted at 50 *per cent.*, and an action was brought on the policy.—It was contended on the part of the defendant, that the adjustment was not binding; but that, if it were, it ought to have been declared *on specially*.—Lord *Kenyon*, who tried the cause, was of opinion that it was not necessary to declare specially. He said that the adjustment was *prima facie* evidence against the defendant: But if there had been any misconception of the law or fact upon which it had been made, the underwriter was not *absolutely concluded* by it.—This turned out to be the case, and there was a verdict for the defendant.

The doctrine of Lord *Kenyon*, in this case, far from shaking, or even narrowing the rule, as laid down by Lord C. J. *Lee*, seems, on the contrary, to have strongly confirmed it. Lord *Kenyon* says, that if there had been any misconception of the law or fact upon which the adjustment had proceeded, the underwriter would not have been *absolutely concluded* by it. It is plain then, that he considered the adjustment like a note of hand, as *prima facie* evidence of a debt, but not conclusive, since the adjustment, like the note of hand, might be impeached by evidence on the part of the defendant.

De Garra v. Galbraith, at N. P. after Trin. 1795. Park 118.

In the second case adduced in support of the objection to the rule, as laid down by Lord C. J. *Lee*, it is stated that the plaintiff went to trial, having no evidence to produce but the adjustment; and the witness who proved it, swore that, soon after they had signed it, *doubts arose in the minds of the underwriters*, and they refused

refused to pay, upon which, Lord *Kenyon* said that, under these circumstances, the plaintiff must go into other evidence; and not being able to do this, he was nonsuited.—In the following term, a motion was made to set aside this nonsuit, upon the ground that an adjustment was *prima facie* evidence of the whole case, and threw the *onus probandi* upon the underwriter; and that it amounted to more than proof of the defendant's subscription to the policy.—Lord *Kenyon* said;—"I admit the adjustment to be evidence in the cause to a certain extent: But I thought at the trial, and still think, that when the same witness who proved the signature of the defendant to the adjustment said, that doubts, soon after the adjustment took place, arose in the minds of the underwriters, as to the honesty of the transaction, and they called for further proof, the plaintiff should have produced other evidence; and that, shutting the door against enquiry, after an adjustment, would be putting a stop to candour, and fair dealing amongst the underwriters.—Accordingly the court refused to grant a new trial.

In the account of what passed at the trial of this cause, it does not appear upon what subject the doubts arose in the minds of the underwriters, nor at what time the further proof was called for. It would seem, from the above report, that further proof was only called for at the trial by the learned judge who tried the cause. It is unfortunate that there is no account of this case in the term reports, the sixth volume of which contains the cases of the term in which it is said to have come before the court. It is to be presumed that an accurate statement of the evidence on which the plaintiff was nonsuited, would have clearly shewn that the decision of the learned judge at *nisi prius*, and afterwards of the court of King's Bench, was correctly right; that justice was done; and that, under the particular circumstances of the case, this might have been a very proper exception to the rule, as laid down by Lord C. J. *Lee*. But as the case stands, in the above report of it, it would be very difficult to reconcile it, even to the decision of the same learned judge in the above case

Whether this case can be deemed a sufficient authority to narrow the rule laid down by Lord C. J. *Lee*.

of *Rodgers v. Maylor* (a); nor can it be accounted for, upon any known principle of law, that an underwriter, who had signed an adjustment of a loss with a promise to pay it, might afterwards, merely because he chose to alledge that *doubts had arisen in his mind*, refuse to pay the sum he had acknowledged to be due; and that, merely on the suggestion of these doubts, the insured should be called upon at the trial to prove his whole case, at a time, too, when it was no longer, perhaps, in his power to procure the necessary evidence. The candour and fairness which ought to preside in the litigation of all commercial questions, would never go the length of requiring this. If, indeed, the underwriters, harbouring these doubts, should give the insured reasonable notice of their intention to dispute his claim, it would be competent to them, perhaps, to do so; and even then, they ought to come prepared to shew some fraud or concealment on the part of the insured; or some misconception of the law or the fact, on their own part, which had induced them to agree to the adjustment. This would certainly make an end of the adjustment, and it would then be incumbent on the insured, under whatever difficulty, to go into the proof of his whole case. It is possible, nay, very probable, that this, or something like it, appeared in the case of *De Garron v. Galbraith*. But, as that case is reported, it cannot be deemed of sufficient weight or authority to alter or shake the rule as laid down in the case of *Hog v. Gouldney*; and which, as has been already observed, is greatly enforced and confirmed by Lord Kenyon, in the case of *Rodgers v. Maylor* (b).

But it is said, that the spirit of the rule laid down in this last case, was adopted in the *very modern* case of *Thelluson v. Fletcher* (c), which has been already fully

(a) Sup. 544.—(b) Vid. *Christian v. Coombe*, *Esp. Rep.* 486, where Lord Kenyon lays down the same doctrine.—(c) *Thelluson v. Fletcher* was determined 16 years before that of *De Garron v. Galbraith*.

stated (a). The only point determined in that case at all applicable to the present subject was, that, if an underwriter suffer judgment to go by default, he thereby confesses the plaintiff's title to recover, and the plaintiff shall not, therefore, be obliged to prove his interest; a point about which, without that decision, no lawyer could have entertained much doubt.—All that can be said on this determination is, that, as far as it can be supposed to bear on the present question, it corroborates the rule as laid down by Lord C. J. *Lee*.

(a) Sup. 105.

CHAP. XVI.

Of Return of Premium.

THE premium paid by the insured, and the risk which the insurer takes upon himself, are considerations each for the other: They are correlatives, whose mutual operation constitutes the essence of the contract of insurance. The insurer shall not be exposed to the risk, without receiving the premium; nor shall he retain the premium, which was the price of the risk, if, in fact, he runs no risk at all (*a*). For wherever a man receives the money of another upon a consideration which happens to fail, or is never performed, he is under an obligation, from the ties of moral honesty and natural justice, to refund it. In such case, the law implies a debt, *quasi ex contractu*, and gives the insured an action against the insurer, for money had and received to his use, to recover back the premium (*b*).

It will be our business in the present chapter, to shew under what circumstances the insured shall be entitled to demand a return of premium.—The cases in which the insured shall be entitled to such return, may be reduced to the following heads;

1. Where the contract is void *ab initio*;
2. Where the risk has not been commenced;
3. Upon the performance of certain stipulations;
4. When the deduction of one half *per cent.* shall be allowed.

(*a*) Per Lord Mansfield, 3 Bur. 1240.—(*b*) Vid. 2 Bur. 1008; Doug. 454; Cowp. 668; 1 Show. 156. 3 T. R. 266.

Sect. 1.

*Of Return of Premium where the Contract is void
ab initio.*

IN general, when the contract is void *ab initio*, it is so, either for want of interest in the insured, or because the insurance is illegal, or for fraud on the one side or the other.—We will enquire in what cases there shall be a return of premium on each of these grounds.

1. *Where the Contract is void for Want of Interest.*

A want of interest may be either *total*, as where the insured has nothing on board the ship; or *partial*, as where he has an interest in the thing insured, but not to the amount stated in the policy. And it may be laid down as a general rule, that if, through mistake, misinformation, or any other innocent cause, an insurance, in a single policy, be made without any interest whatsoever in the thing insured, or to a much larger amount than its real value; in the one case, the insurer shall return the whole premium; in the other, he shall return upon all above the true value. Thus, if a man, supposing he has goods on board a certain ship to the value of 1000*l*. insure to that amount, but afterwards find either that he has no goods at all on board, or that he has goods only to the amount of half the insurance: In the one case, he would be entitled to a return of the whole premium; in the other to a return of a moiety (*a*). And all the underwriters upon a policy in which the effects are insured beyond their value, must bear any loss that

If an insurance be made without interest, or for more than the real interest, there shall be a return of premium.

(*a*) Vid. *Le Guidon*, ch. 2, art. 18, Ord. of *Amst.* art. 22. *Pothier* h. t. n. 77, 183. *Roccus*, n. 82. *Valin*, sur art. 23, p. 67.

may happen, and repay a part of the premium, in proportion to their respective subscriptions, without regard to the priority of their dates (*a*).

If there be an over-insurance by several policies, the underwriters will all be liable to the extent of the value; and they will all be entitled to a return of premium for the residue.

If, by *several policies*, made without fraud, the sum insured exceed the value of the effects, these several policies will, in effect, make but one insurance, and will be good to the extent of the true interest of the insured; and, in case of loss, all the underwriters on the several policies shall pay according to their respective subscriptions, without regard to the priority of their dates. It follows from thence that all the underwriters on the several policies would be equally entitled to a return of premium for the sum insured above the value of the effects, in proportion to their respective subscriptions.— In this particular, our law, as we have already shewn (*b*), differs from the ancient law, and indeed from the law of most of the other maritime states at this day.

Upon a wager policy the insured cannot recover back the premium, at least after the risk is run.

We have already seen that a wager policy, at least since the stat. 19 G. II, c. 37, is illegal and void (*c*). Upon such a policy the insured cannot recover back the premium. At least if he wait till the risk is over, he shall not, after thus taking the chance of a loss, and of obtaining from the *generosity*, at least, of the underwriters, the sum insured, be permitted to recover back the premium.

Lowry and another v. Bourdieu, Doug. 451.

The plaintiffs had lent one *Lawson*, captain of the *Lord Holland* Indiaman, 26,000 l., for which he gave them a *common bond*. While he was with his ship at *China*, the plaintiffs got a policy underwritten by the defendant and others, “ At and from *China* to *London*, “ beginning the adventure upon the goods from the loading thereof on board the said ship at *Canton*, &c. and

(*a*) Habet omnis affecluratio hoc peculiare, ut in ea non sit prius nec posterius, quantum ad effectum et validitatem contractus; sed ultimus affeclurator tantundem participat in damno et lucro ex affecluratione provenienti, quantum prior. *Kuricke* diatr. n. 16.—(*b*) Vid. sup. 115, 116.—(*c*) Vid. sup. ch. 4. § 2.

“ upon the said ship from her arrival at Canton, valued at
 “ 26,000 l., being the amount of Captain Patrick Law-
 “ son’s common bond payable to the parties, as shall be
 “ described at the back of this policy, dated 16th Decem-
 “ ber 1775: And in case of loss, no other proof of in-
 “ terest to be required than the exhibition of the said
 “ bond; warranted free from average, and without be-
 “ nefit of salvage to the insurers.”—At the head of the
 subscription was written, “ On a bond as above expressed.”
 —Captain Lawson sailed from China and arrived safe with
 his adventure in London.—The insured brought an ac-
 tion to recover back the premium, on the ground that
 the insurance having been made without interest, the po-
 licy was void, within the statute (a). There was a ver-
 dict for the defendant by the direction of Lord Mansfield,
 who tried the cause, upon the ground that, though the
 policy was void, as being without interest, yet that both
 parties were equally guilty of a breach of the law, and
 therefore the rule *in pari delicto, melior est conditio possi-*
dentis applied, and the plaintiffs could not recover back
 the premium. Upon a motion for a new trial, the court
 adopted this opinion.—Lord Mansfield said,—“ This is
 clearly a gaming policy. The nature of the insurance
 is known to both parties. The plaintiffs say; ‘ We mean
 to game; but we give our reason for it; captain Law-
 son owes us a sum of money, and we want to be secure
 in case he should not be in a situation to pay us.’ It
 was a hedge. But they had no interest; for, if the ship
 had been lost, and the underwriters had paid, still the
 plaintiff would have been entitled to recover the amount
 of the bond from Lawson.—This, then, is a gaming po-
 licy, and against an act of parliament; and therefore
 it is clear that the court will not interfere to assist either
 party; according to the well known rule, that, *in pari*
delicto melior est conditio possidentis: Not, that the defen-
 dant’s right is better than that of the plaintiff; but he
 must draw his remedy from clear fountains.”—Mr. Jus-

(a) 19 G. II., c. 37, sup. 103.

Yet, before the risk is run, and while the contract is executory, the insured may recover back the premium.

Justice *Asbush* concurred in this opinion. Mr. J. *Wilder* thought that this was not a gaming policy; that the money was paid upon a mistaken idea, and ought to have been refunded.—Mr. Justice *Buller* agreed with Lord *Mansfield* and Mr. Justice *Asbush*, that this was a gaming policy, being without interest: But he held that the reason why the plaintiffs could not recover was, that an action brought to rescind a contract, must be brought while the contract continues executory; and then it can only be done on the terms of restoring the other party to his original situation. He mentioned a case of *Walker v. Chapman*, in B. R. some years before, where a sum of money had been paid in order to procure a place in the customs. The place had not been procured, and the party who paid the money, having brought his action to recover it back; it was held that he should recover, because the contract remained executory. “So,” said he, “if the plaintiffs in this case had brought an action before the risk was over, they might have recovered; but having waited till the risk was run, it was then too late (a).”

The reader, in perusing the foregoing case, must have observed that though Mr. Justice *Buller* concurs in opinion

(a) There is a case of *Wharton v. De la Rive*, (at N. P. after Mich. 1782), mentioned in *Park* 376, where an action is said to have been brought on two wagers, “one of 26l. 5s. to 100l.: the other of 13l. 2s. 6d. to 30l.” that the *American* colonies would be acknowledged as independent states by *France*, some time between the first of *February* and the first of *April* 1778. It is stated, that upon the opening of the case for the plaintiff, Lord *Mansfield* directed a nonsuit, but it does not appear upon what ground; whether because the wagers were illegal, or because they were in nature of wagering insurances, and void by the act. It is said, however, that the plaintiff’s counsel insisted on a verdict for the premium, as if they were in fact insurances, which Lord *Mansfield* permitted, upon the ground of the contract being void. The case of *Lowry v. Bourdieu* was then cited by the defendant’s counsel, to shew that he was entitled to keep the premium. Lord *Mansfield* is made to answer,

nion with Lord *Mansfield*, that the insured was not, under all the circumstances of the case, entitled to a return of the premium, yet he assigns a different reason for his opinion.—Lord *Mansfield* considered the insurance as an illegal contract, and both parties offenders against the law; and then founds his judgment on the maxim, *in pari delicto melior est conditio possidentis*; from which it may be inferred that it was his lordship's opinion, that, even if the insured had thought proper to rescind the contract before the risk commenced, or, which is the same thing, before the event was known, he could not have recovered back the premium.—Mr. Justice *Buller* takes a different ground; namely, that though an action might have been maintained to recover back the premium, while the contract was *executory*, upon the terms of restoring the underwriter to his original situation; yet, after the risk is run, it is too late to attempt to rescind the contract.

In the case of *Vandyk v. Hewet*, which we shall presently have occasion to mention more particularly, the court of King's Bench seems to have adopted the principle upon which Lord *Mansfield* founded his judgment. It would seem, therefore, that Mr. Justice *Buller*'s doctrine would apply only to the case of an insurance without interest, *innocently* made.

Upon the authority of this case it has since been determined, that if the contract be void, as being a re-insurance, within the stat. 19 G. II., c. 37, § 4., the insured shall not be entitled to a return of premium (a).

If the contract be void, as being a re-insurance, there shall be no return of premium.

answer, that it did not apply, as, in that case, the risk had been run. But that could not distinguish it from the case before his lordship, because, if these wagers were to be considered as insurances, the risk was over on the first of April 1778, five years before the action was brought. Nay, the action was brought on the ground that the plaintiff had won his wager.

(a) *R. Andrie v. Fletcher*, 3 T. R. 266.

If the insurer could ever have been called upon to pay the sum insured, there shall be no return of premium.

If, under any circumstances, the insurer might, at any time, have been called upon to pay the whole sum insured, the premium is earned, and he shall not be obliged to return any part of it. Therefore, in the case of a valued policy, though the sum in the policy be twice the value of the effects insured, there shall be no return of premium (*b*).

Captors having insurable interest in their prize before condemnation; if they insure, they shall not have a return of premium, though it should be afterwards adjudged no prize.

If the insured have a contingent insurable interest in the thing insured at the time when the policy is effected, and the risk be once begun, there shall be no return of premium, though it should eventually turn out that he had no title to the thing insured. Therefore, the following case will shew, that though the captors of a ship seized as prize have an insurable interest therein before condemnation; yet, should the ship afterwards be adjudged to be no prize, and restitution be awarded to the owners, there shall be no return of premium, if the risk was commenced.

Boehm and others v. Bell, 8 T. R. 154.

Three frigates having taken the ship *Westcapelle* off the *Cape of Good Hope*, then bound from *Batavia* to *Boston*, the captors put her under the command of a lieutenant, as prize-master, and on the 30th of *January* 1797, wrote to their agents in *England*, mentioning the capture of the *Westcapelle*, formerly a *Dutch East India* ship, but then navigated under *American* colours from *Batavia*, by the name of the *George of Boston*, manned with a crew above two thirds *Dutch*, which they supposed a lawful prize; and stating, that as there was no court of admiralty there, they were under the necessity of sending her to *England* for trial; and then directed an insurance for that voyage to be made on the ship and cargo, to the amount of 40,000*l.* (though the estimated value was 150,000 *l.*) which the agents in *England* accordingly caused to be effected at a premium of 20 guineas *per cent.* to return 8*l.* *per cent.* if the ship departed from the *Cape* or *St. Helena*, with convoy for *England*, and arrived. The ship sailed from the *Cape* with convoy for *St. Helena*, where she arrived, and sailed from thence for *England*, without convoy, and

(a) 2 *Magins*, 137.

arrived

arrived in safety in the *Thames* on the 7th of *August* 1797. But the court of admiralty 'declared the ship and cargo to be *American* property, and decreed them to be restored, except the part claimed by the chief mate, who was pronounced to be an enemy, and his property on board condemned as lawful prize.' The ship and cargo, except the part of the chief mate, were restored accordingly. After this sentence, the plaintiffs brought an action against the defendant, to recover 18l. 19s. 10d. *per cent.* as a proportion of the premium to be returned, in respect of the ship and such part of the cargo as had been decreed to be restored. Upon the trial of the cause, the jury found a verdict for the plaintiffs, subject to the opinion of the court upon a case, which stated the above facts.—When the case came before the court, the defendant insisted that the insured had an insurable interest to the amount of the sum insured, and, in the event of a loss, might have recovered against the insurers. That the fallacy of the plaintiff's argument arose from not distinguishing between an *insurable interest* and an *absolute indefeasible property*. That the insured had the possession of the thing insured, together with a contingent interest in the event of its being condemned; besides, they had an immediate interest in the subject matter, arising out of their responsibility for the care and safety of the ship; for in case of gross negligence or misconduct, the court of admiralty would adjudge a compensation to the owners in damages; and if, in any event, the insurers might have been answerable, there could be no return of premium. 2dly. That this being a valued policy, made *bonâ fide*, without any intention of fraud, and the insured having an indisputable interest, the extent of the interest was immaterial. 3dly, That as this was an insurance on foreign ships, it was not necessary that the insured should have any interest at all, it not being within the stat. 19 G. II., c. 37.—The court were clearly of opinion, that the insured had an insurable interest, and that the risk having been run, there could be no return of premium.—Lord *Kenyon* said,—“ I will not enter into a discussion of either of the two last points made by the defendant's

defendant's counsel, because the first alone furnishes, in my opinion, an answer to this action.—The real question in this case is one of the most simple that can be stated. It is merely this, whether the insured had or had not *any interest*. The captors had the possession of the property insured, and from that possession certain rights and duties resulted. If it were a legal capture, the captors were intitled; if not, they were liable to be called to an account in the court of admiralty, where they might be amerced in damages and costs. It was important, therefore, to them to take care that there should be something forthcoming to answer for the amount of these damages."

2. *Where the Insurance is void, being upon a Trading with the Enemy.*

Though an insurance to protect a trading with the enemy is void; yet the insured shall not recover back the premium.

It has already been shewn that no *British* subject can legally carry on any commerce with the enemies of the state, without the King's licence; and that an insurance made to protect such a trading is void (a). In the following case it was determined that the insured, in such an insurance, cannot recover back his premium: And though this was after a loss had happened, it was after the insurers had availed themselves of the illegality of the contract to avoid paying the loss, and it was founded upon the same principle upon which Lord Mansfield founded his judgment in the case of *Lowry v. Bourdieu* (b), which would have supported the decision in that case, even if the action had been brought while the contract was executory.

Vandyk and others v. Hewit,
1 East 96.

An insurance was made on goods at and from *London* to *Emmden* or *Amsterdam*, at a premium of ten guineas *per cent.*, to return five upon their arrival at their place of destination.—In an action on this policy for a loss by capture, it was averred in the declaration that the insurance was made for the benefit of certain persons therein named.—Upon the trial of the cause it appeared that the goods were shipped on board a *Prussian* neutral vessel,

(a) Vid. sup. 70.—(b) Sup. 551.

on account, partly of the plaintiffs who were naturalized foreigners resident in *London*, and partly of certain other persons, aliens, then resident in *Holland*. It appearing that the insurance was intended to cover a trading with *Holland*, that country then being at war with this kingdom, the idea of recovering the loss was given up on the authority of the case of *Potts v. Bell* (a).—The plaintiffs then contended that they were entitled to recover back the premium, on the ground that the policy never attached, and the risk had therefore never commenced. And it was compared to the case of *Lacauflade v. White* (b), in which it was determined that a person who has deposited money upon an illegal wager may recover it back, even after the event is determined against him.—Lord *Kenyon*, who tried the cause, permitted a verdict to be taken by the plaintiff for the premium, with liberty for the defendant to move to set that verdict aside, and enter a verdict for the defendant.—Upon that motion, the court were clearly of opinion, that the plaintiffs had no right to recover back the premium.—Lord *Kenyon* said;—"There is no distinguishing this case, on principle, from the common case of a smuggling transaction. Where the vendor assists the vendee in running the goods to evade the laws of the country, he cannot recover back the goods themselves or the value of them (c). Both parties are *in pari delicto*, and *potior est conditio possidentis*."

If the contract be void, on account of a non-compliance with any warranty, express or implied; as if the ship do not sail on the day prescribed, or do not depart with convoy; or be not sea-worthy; and there be no fraud imputable to the insured; he shall be entitled to a return of premium; because the contract never attached, and the risk, therefore, never commenced. In such case,

Where the policy is void, and there is no fraud imputable to the plaintiff, he is entitled to a return of premium.

(a) 8 T. R. 548, sup. 73.—(b) 7 T. R. 535. But *Vid.* 8 T. R. 575, where it was held that if the money deposited upon an illegal wager be paid over to the winner, it cannot be recovered back.—(c) *Vid.* *Biggs v. Lawrence*, 3 T. R. 454. *Clugan v. Penahua*, 4 T. R. 466. *Waymell v. Reed*, 5 T. R. 599.

e. 16, § 1.; and yet the borrower, who is a party to the illegal contract, shall never be obliged to repay it. Nor is this principle confined to the statute law; for, by the common law, the vendor of smuggled goods shall not be allowed to recover the price of them from the vendee, though he be far from innocent of the fraud against the revenue^(a). Many other instances might be adduced from the common law to shew that one party shall be permitted to enrich himself by the punishment of another, even where they are both *in pari delicto* ^(b). And it would seem from the opinion of Lord Mansfield in *Lowry v. Bourdieu* ^(c), and that of Lord Kenyon in *Vandyk v. Hewet* ^(d), that, in the case of a gaming policy, the insured cannot recover back his premium, even where the risk has never been commenced. How much stronger, in point of justice, is the claim of an innocent underwriter to retain the premium of an insurance, by which the insured meant to defraud him, and which is some satisfaction for the risk he has run, though not an adequate punishment of the insured for the fraud he meditated.

It has been determined that there shall be a return, if the contract be void for fraud committed by the insured.

Wittingham v. Thornburgh, 2 Vern. 206. Pr. in ch. 20.

But reasonable and just as this idea may seem, it has not always prevailed. The court of chancery, in two instances ordered a return of premium where the policies were declared void for fraud committed by the insured.

The first of these cases was an insurance on the life of one *Horwell*, for a year, interest or no interest. The insured, in order to draw in subscribers, agreed with one *Marwood*, a neighbour of *Horwell's*, an eminent merchant who was a leading man in such cases, to subscribe first; but he was to lose nothing, in case *Horwell* died within the year, but, on the contrary, was to share what should be gained by the other subscribers. Upon the credit of *Marwood's* subscribing, several others, (who had enquired of him about *Horwell*), subscribed likewise. *Horwell* lived but four months; and a bill being brought

(a) Vid. 3 T. R. 454; 4 T. R. 466; 5 T. R. 599.—

(b) Vid. 3 T. R. 454, *Cowp.* 343.—(c) Sup. 551.—(d) Sup. 557.

to be relieved against the policy, and it appearing that the insured had no interest in the life of *Horwell*, who was in a languishing condition at the time the insurance was effected, the court decreed the policy to be delivered up to be cancelled; but the premium was to be repaid, the plaintiff's deducting their costs thereout.

The other case was an insurance on a ship, where the insured was guilty of a fraudulent concealment, for which the court of chancery ordered the policy to be delivered up to be cancelled; but, in like manner, directed the premium to be paid back, and allowed out of the costs.

This rule of the court of chancery, was first adopted at law, upon the authority of the above two cases, in an action brought on a policy of insurance on a ship, with a count for money had and received by the defendant to the plaintiff's use.—The cause was tried under a decree of the court of Chancery, where the insured, (being then plaintiff), offered to pay back the premium which was 10*l.*; but no money was paid into court in this action.—There was a verdict for the plaintiff for the 10*l.* premium, on the count for money had and received, although the jury found the policy to have been fraudulent. In fact, in this case, like the last, the first underwriter was only a decoy-duck to mislead others, and was not himself to be bound by the policy.—But it was agreed to bring before the court this question.—“Whether, upon a policy being found fraudulent, the premium should be returned.”—In support of the affirmative, the two last mentioned cases were cited on the part of the insured. On the other side was mentioned a case of *Rucker v. Hollingbury*, before the Master of the Rolls, who held an opinion contrary to those cases.—But Lord Mansfield said there must have been some mistake in the statement of this case; for the practice of the court of Chancery was certainly agreeable to the former cases: He then enquired whether there was any common law determination to the same effect, and it not appearing that there was, he said it was plain what must be done in this case: For he looked upon the

De Costa v. Scanderet, 2 P. W. 170. sup. 351. S. P.

The same doctrine adopted in a court of law.

Wilson v. Duckett, 3 Bur. 1361.

offer made by the underwriter's bill in equity to be the same thing as if the money had been *actually* brought into court in the present cause: Therefore the verdict for the plaintiff was set aside, and a verdict entered for the defendant.

It has been said, however, of this case, "that a trial being had under a decree of the court of Chancery, and the insurer having there made an offer of returning the premium, the court of King's Bench considered the offer in the same light as if he had paid the money into court, and therefore the question *remained undecided* (a). But, from the mode of disposing of this case, it is plain that, if the underwriter had not done what was deemed equivalent to bringing the money into court, there would have been a verdict against him for the premium. The court, therefore, clearly decided that the insured was entitled to a return of premium. And this decision had the more weight as it may be fairly concluded, from the gross misconduct of the insured, and from the expedient adopted by the court to oust him of the costs at law, that this point was decided in his favour with much reluctance.

But the courts now hold a contrary doctrine.

Tyler v. Hern,
at N. P. after
Hil. 1785, *Park*,
218.

But, be that as it may, Lord *Mansfield*, upon better reflection, saw at length, the impolicy, not to say injustice, of permitting the insured to take his chance of defrauding the underwriters, without the risk of losing even his premium. — Therefore where an action was brought on a policy for a total loss, and it appeared to the satisfaction of the jury, that the plaintiff had given the order to his broker to get the insurance effected, after he had received information of the loss of the ship, the jury found a verdict for the defendant; and Lord *Mansfield*, who tried the cause, said the fraud was so gross, that the plaintiff ought not to recover the premium from the underwriters.

The fraud was certainly very gross in this case, but not more gross than in each of the three preceding cases, which

(a) *Park* in index tit. *Return of premium*.

we have cited.—But this important question has been since finally settled in a case which came before the court of King's Bench, and where the fraud had been committed, not by the insured himself, but by his agent; and the whole court were of opinion that, in all cases of *actual fraud*, on the part of the insured, committed either by himself or his agent, the underwriter shall retain the premium.

Chapman and others, assignees of Kennet v. Fraser, B. R. Tr. 33 G. III. Park, 218.

Sect. 2.

Where the Risk has not been commenced.

ALL the foreign authors agree that insurance is a conditional contract, that the risk is of the essence of it, and that the premium is the price of the risk to be run: Yet many of them hold that the insured is not permitted to dissolve the contract by his own act; and therefore if he relinquish the intended voyage, the insurer is not bound to return the premium, and that he has even a right to demand it, if it has not been already paid (*a*).—They except only the case where it becomes impossible for the insured to ship the goods, or to cause the ship to proceed on her voyage (*b*).

Foreign authors maintain that the insured cannot, by his own act, dissolve the contract, and demand a return of premium.

But

(*a*) An affecurator teneatur restituere pretium, eò quod in navi non fuerunt merces? Videbatur teneri affecurator ad restitutionem pretii recepti ob causam illius periculi; tamen in contrarium est veritas, quòd non solum non teneatur pretium restituere, imò possit petere illud; et ratio est, quia licet emptio periculi non teneat in præjudicium promissoris, tamen in ejus favorem, et in præjudicium affecurati falsa assertio bene tenet. Sic etiam quia illa causa cessat, factò domini mercium, eò quod nullas merces misit in navem, et non factò affecuratoris, per quem non stetit. *Roccus*, h. t. not. 11, 13, 14, 82, 88; vid. *Santerna*, part. 3, n. 19, 20, 22; *Straccba* gl. 6. *Casaregis*, disc. 1, n. 53, 58.—(*b*) In casibus in quibus impeditur navigatio, putà si navis sit combusta in portu, vel destructa, vel rex eam capiat pro necessitatibus publicis, et impeditur conditio affecurationis: quia tunc non posset imputari conditionis defectus magis uni, quam alteri parti, nullus tenebitur; et pretium pe-

In *Holland* and *France*, the law is different.

But the rules which prevail in *Holland* and *France* are more conformable to the nature of the contract of insurance. In *Holland*, if the goods insured should not be shipped, or should appear to be of less value than the sum insured, the insured may, in the one case, demand a return of the whole premium, in the other, a return for what is over-insured (*a*).—In *France*, if a stop be put to the voyage before the ship sails, even by the act of the insured, the insurance becomes void, and the insurer shall return the premium (*b*).

In *England* it is a general rule that if the risk be not begun, to whatever cause this be owing, the premium shall be returned.

In *England*, the rule is, that where the risk has not been begun, whether this be owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned. The reason is, that a policy of insurance is a contract of indemnity; the underwriter receives the premium for running the risk of indemnifying the insured; and therefore if he do not run the risk, to whatever cause this may be imputable, the consideration for which the premium was paid to him fails, and he ought to return it (*c*).

But where the voyage and premium are divisible, and any part not begun, the premium for that part shall be returned.

But if the insurance be upon a voyage which is divisible into several distinct risks, and which are, in effect, several distinct voyages, the premium may be apportioned according to these several risks; and in case one or more of these risks should not have been commenced, the proportion of premium applicable to those parts shall be returned.

riculi non potest peti, et solum repetitur, quasi causâ non fecutâ. *Roccus*, h. t. not. 15, 56.—Si, ex aliquo impedimento, assicuratus non potuisset merces suas onerare, tunc contractus assicurationis locum non haberet, ita ut si pretium assicurationis fuisset solum, peti certo poterit per assicuratum. *Casaregi* disc. 1, n. 182, disc. 62, n. 4. Vid. *Le Guidon*, ch. 9, art. 16, which is nearly to the same effect. Vid. Ord. of *Antwerp*, art. 16. 2 *Magens* 27. *Locennius*, lib. 2, ch. 5, n. 16.—(*a*) Ord. of *Amsterdam*, art. 23, 2 *Mag.* 136.—(*b*) Ord. of *Louis XIV.* h. t. art. 37. Vid. *Emerig.* tom. 2, p. 154. *Pothier*, h. t. n. 178, 179.—(*c*) Per Lord *Mansfield*, in *Tyrie v. Fletcher*, *Cowp.* 668.

Thus:

Thus :—A ship was insured, “At five guineas *per cent.* lost or not lost, at and from *London to Halifax*, “warranted to depart with convoy from *Portsmouth* for “the voyage.”—Before the ship arrived at *Portsmouth*, the convoy was gone. Notice of this was immediately given to the underwriters, who were desired, either to make the long insurance or return part of the premium. They refused, and the insured brought an action to recover a part of the premium. At the trial, a case was reserved for the opinion of the court, stating the above facts, and also stating, that the jury found that the usual and settled premium from *London to Portsmouth* was one and one-half *per cent.* which the plaintiff offered to allow the defendant to retain; and that it was usual for the underwriters, in such cases, to return part of the premium: But the *quantum* was uncertain, and must in its nature be so; because it depended upon uncertain circumstances.—Upon this case, the court were unanimously of opinion that the plaintiff was entitled to recover.—Lord Mansfield said,—“These contracts are to be taken with great latitude: The strict letter is not so much to be regarded as the object and intention of the parties. Equity implies a condition that the insurer shall not receive the price of running a risk, if he runs none. The premium is without consideration, as to the voyage from *Portsmouth to Halifax*; and then this case is within the general principle of actions for money had and received. I do not go upon the usage, which is only that, in like cases, a part of the premium is returned, without ascertaining *what* part. If the risk be not run, though it be by neglect, or even the *fault*, of the insured, yet the insurer shall not retain the premium. It has been objected that the voyage being begun, and part of the risk already run, the premium cannot be apportioned: But I can see no force in this. This is not a contract so entire that there can be no apportionment: For there are two parts in it, and the premium may be divided into two distinct parts relative, as it were, to two distinct voyages. The practice shews that it has been usual, in such cases, to return a part of

A ship is insured at and from *London to Halifax*, warranted to depart with convoy from *Portsmouth*, at five guineas *per cent.* On her arrival at *Portsmouth*, she finds the convoy gone. Notice of this is immediately given to the insurer.—The premium shall be apportioned.

Stephenson v. Snow, 3 *Bur.* 1237.

the premium, though the *quantum* be not ascertained: And indeed the *quantum* must vary as circumstances vary. But though the *quantum* has not been ascertained; yet the principle is agreeable to the general sense of mankind."—Mr. Justice *Denison*, and Mr. Justice *Foster*, concurred in this opinion.—Mr. Justice *Wilmot* said,—“The usage to return a part of the premium, in such cases, is a strong proof of the equity of the thing; and nothing can be more just and reasonable. If the risk be once begun, the insured shall not deviate or return back, and then say, I will go no further under this contract, but will have my premium returned. Upon this policy, there are two distinct points of time, in effect two voyages, which were clearly in the contemplation of the parties; and only one of the two voyages was made, the other was not at all entered upon, nor was the risk ever begun (a).”

In the following case, though the facts did not enable the court to pronounce any definitive judgment upon this point; yet, in sending it back to a new trial, an opinion was delivered which tends to strengthen the authority of the above decision.

A ship is insured from *Hull* to *Bilboa*, warranted to depart from *England*, with convoy. The voyages from *Hull* to *Portsmouth*, the place of rendezvous, and from *England*, thence to *Bilboa*, may be considered as distinct;

An insurance was made on the ship *Manning*, “At “and from *Hull* to *Bilboa*, warranted to depart from *England* with convoy.”—The ship sailed from *Hull* to *Portsmouth*, and from thence departed with a convoy; but this not being direct for *Bilboa*, she left it, and was afterwards captured.—In an action on this policy, upon the above facts coming out in evidence, the plaintiff would have been nonsuited; but his counsel insisted that he was entitled to a return of premium; and there being a count in the declaration for money had and received, and

(a) Vid. Lord *Mansfield*'s observations on this case, (*Corp.* 669, inf. 575.), in which he labours to vindicate the decision of it, by shewing that the grounds of it were that the voyage was in fact two voyages, and that the contract comprised two distinct conditions. Vid. also the observations on this and the other cases on this point. 1 *Pul. & Bos.* 174.

no money paid into court, a verdict was given for the plaintiff for the whole premium.—Upon a motion to set aside this verdict and enter a nonsuit, it was contended on the part of the defendant, that as the risk had commenced, the plaintiff could not be entitled to any return of premium.—On the part of the plaintiff, it was insisted that there were two distinct voyages in this case; the one from *Hull* to the place of rendezvous, and the other from thence to *Bilboa*, the port of discharge; that the risks were of different natures, one being without, the other with, convoy; and that, as the latter was never begun, the plaintiff must at all events be entitled to return a proportion of the premium on that account.—The court directed the verdict to be set aside, and granted a new trial, being of opinion that if the underwriters were not entitled to retain the whole premium, yet, having ran the risk from *Hull* to *Portsmouth*, they were at least entitled to retain a proportion of it, if, upon a further investigation, it should turn out that the voyage was divisible, and that the premium in such cases had ever been apportioned (a).

Yet, where an insurance is made on a ship, “*at and from*” her port of departure, and warranted to fail on or before a given day, and the ship does not fail within the time required by the warranty, by which the insurer is discharged, it has been holden that the risk at and from the port of departure is entire, and not divisible into two distinct risks, and therefore the premium cannot be apportioned so as to entitle the insured to any return.

Thus:—A ship was insured “*At and from Jamaica to Liverpool*, warranted to fail on or before the first of *August*; premium twenty guineas *per cent.* to return *eight, if she sailed with convoy.*”—The ship did not fail till *September*, and was lost in the voyage.—The warranty, as to the time of sailing, not being complied with, the

and in case the ship sails without convoy and is taken, the premium may be apportioned, and a part returned.

Rothwell v Cooke
1 *Pul. & Bos.*
172.

Yet, upon an insurance “*at and from*” a place, the risk is not divisible.

A ship is insured “*at and from Jamaica to Liverpool*, warranted to fail on or before the first of *August*; premium 20 guineas *per cent.* to return 8 guineas if she sailed with convoy.” She did not fail till *September*. The insured shall only be entitled

(a) This upon memory, seems to be the result of what was done by the court, though not fully expressed in the printed report.

to 8 guineas *per cent.* for convoy, and not to an apportionment of the rest of the premium.

Meyer v. Gregson, B. R. East.
24 G. III. MS.

underwriters were discharged from the risk after the first of *August*, and an action was brought by the insured for a return of premium.—The defendant, who was an underwriter for 100 l paid eight guineas into court, being the sum to be returned, if the ship sailed with convoy.—The jury apportioned the premium, and gave eight guineas more for the risk from *Jamaica* to *Liverpool*, which they considered as not having been commenced; thus allowing four guineas for the risk “at *Jamaica*.”—The defendant moved to set aside the verdict, and enter a nonsuit upon the ground that the risk was entire, the premium was entire, and the voyage indivisible.—Lord *Mansfield*, Mr. Justice *Asburst*, and Mr. Justice *Buller*, (against the opinion of Mr. Justice *Willes*, who thought with the jury, that the premium should be apportioned), determined that the insured was not entitled to recover more than had been paid into court, and therefore the rule was made absolute.—Lord *Mansfield* said,—“It would be endless to go into an enquiry about the value of the risk “at *Jamaica* ;” which is different at different sides of the island: The parties divided the risk, as to convoy; for eight guineas were to be returned if the ship sailed with convoy. Independent of that, it was an insurance “At and from *Jamaica* to *London*,” at 12 guineas *per cent.* with an absolute warranty to sail “on or before the 1st of *August*,” and nothing is said from whence it can be inferred that it was meant that there should be two risks, or by which the risk at *Jamaica* could be distinctly estimated (a).”—Mr.

(a) Lord *Mansfield*, in delivering his opinion in the case of *Tyre v. Fletcher*, Cowp. 670, inf. 574. seems to have entertained a different sentiment on this point. He then inclined to think that if the words of the policy were “at and from, provided the ship shall sail on or before the 1st of *August*,” it would fall within the reasoning of *Stevenson v. Snow*, and that there would then be two parts, or contracts, of insurance, with distinct conditions. But this can only be considered as an extra-judicial opinion expressed very doubtfully.

Justice

Justice Buller said,—“ As the parties have not considered it as two risks, nor estimated the risk “ *at Jamaica*,” neither the court or jury have any right to do it for them. In all the insurances from *Jamaica*, the policy runs “ *at and from* ;” and though, in many instances, the voyage has not been commenced, yet there never was an idea of any part of the premium being returned ; and no usage to do so has been found by the jury.”

Upon an insurance *at and from* a place, an usage should be proved to warrant a division of the risk.

In a subsequent term the following case came before the same court ; and though the point was not decided by the judges, yet Lord Mansfield, in directing a new trial, laid down the principle, which he conceived ought to govern these cases, in terms which seem more reconcilable to the case of *Stevenson v. Snow* (a) than to the last cited case of *Meyer v. Gregson*.

A ship was insured, “ *At and from* any port or ports “ *in Jamaica to London*, following and commencing from “ *her first arrival there ; warranted to sail with convoy “ for the voyage, from the place of rendezvous.*”—The ship did not get time enough to the place of rendezvous to sail with the convoy,—but failed after, and overtook them ; so that the warranty was not complied with, and the underwriters were discharged from the time of the ship’s failing.—The insured brought an action to recover back a part of the premium for the voyage *from Jamaica*.—At the trial, an usage seemed to have been proved that when the ship was not out of the port of *Jamaica*, the allowance was one-half *per cent*. In other cases it was arbitrary, and two or three *per cent*. was reasonable. There was a verdict for the plaintiff.—Upon a motion for a new trial, the counsel differed as to the facts that were in evidence, and the cause was sent back to a new trial, without the question of law having been much discussed.—Lord Mansfield, however, said, that where there is a *contingency* in the voyage, the risk may be divided. That the reason why there are not two policies in such cases was, that the risk “ *at*,” is capable of exact

A ship insured at and from *Jamaica to London*, warranted to sail with convoy, arrives too late at the place of rendezvous for the convoy, but follows and overtakes them : Whether there shall be a return of premium.

Gale v. Mackell,
B. R. E. ft.
25 G. III.

Where there is a contingency in the voyage, the risk may be divided.

computation. He said the former cases upon this point were contradictory.

In the same term in which this last case came before the court of King's Bench, the following case also came before that court: And though the judges there seem to have laid great stress on the usage found by the jury, to return the premium, deducting one half *per cent.* upon insurances, at and from *Jamaica*, with a warranty to depart with convoy, or to sail on or before a certain day, and the warranty is not complied with; and though it is distinguished from the case of *Meyer v. Gregson* on this ground; yet it cannot be denied that the authority of the case of *Meyer v. Gregson*, is greatly shaken by the case I allude to.

Goods are insured "At and from *Jamaica* to *London*, warranted to depart with convoy before the 1st of *August*." The ship sails before the day, but without convoy. There is an usage, that in such cases the premium shall be returned, deducting $\frac{1}{2}$ *per cent.* for the risk at. The insured shall recover the residue of his premium.

Long v. Allen,
B. R. East 25 G.
III. MS.

That was the case of an insurance on goods, "At and from *Jamaica* to *London*, warranted to depart with convoy, for the voyage, and to sail on or before the first of *August*, at a premium of 12 guineas *per cent.*"—The ship sailed from *Jamaica* to *London* on the 31st of *July*, but without any convoy, whereby the underwriters became discharged from the remaining risk.—An action was brought for a return of premium.—The jury found a verdict for the plaintiff subject to the opinion of the court on the above facts; in addition to which, they found 'that it was the constant and invariable usage in insurances, at and from *Jamaica* to *London*, warranted to depart with convoy, or, to sail on or before a certain day, to return the premium, deducting one half *per cent.* if the ship sailed without convoy, or after the day prescribed.'—Upon this case, the court determined that the plaintiff was entitled to recover according to the usage proved.—Lord *Mansfield* said,—“The law is clear, that if the risk be commenced, there shall be no return of premium. Hence questions arise of *distinct* risks, insured by one policy. My opinion has been to divide the risks. I am aware that there are great difficulties in the way of apportionments, and therefore the court has always leaned against them. But where an express usage is found by the jury, the difficulty is cured.”—Mr. Justice *Buller* said;—“The counsel for the defendant did right to make the chief question, whether any evidence of this usage ought

ought to have been received. In mercantile cases, from Lord Holt's time, and in policies of insurance in particular, a great latitude of construction, as to usage, has been admitted. By usage, places come within the policy, which are not within the words: Usage explains, and even controls the policy. The usage here found by the jury is universal; and though, in some cases, one half *per cent.* is a small premium for the risk *at*; yet the underwriters are aware that it is so, and no inconvenience can result from it. In *Meyer v. Gregson*, no usage was found."

But if the risk be entire, and be once commenced, it is a general rule that there shall be no return of premium. And the shortness of the time when the thing insured was put in risk affords no ground for a return of any part of the premium; which becomes the absolute property of the insurer, the moment the risk commences, though it should cease the moment after. This is one of the favourable circumstances which compensate the insurer for the accidents to which he is exposed. It is impossible to apportion the premium to the duration of the risk, which may be greater in the first hour than in the rest of the voyage (*a*). Therefore if the ship get under weigh and sail on the voyage insured, the premium is acquired, though she return the same instant and wholly abandon the voyage. So if the ship deviate from the voyage insured the next hour after she sails; though this discharges the insurers, yet, the risk having been commenced, there shall be no apportionment, or return of any part of the premium in respect of the diminution of the risk.—The following case will shew that though the voyage be to several different places, and consist of several different distinct parts; yet, if in fact it be *one entire risk*, for *one entire premium*, and not several distinct risks, there shall be no apportionment or return of the premium on account of any contingency which puts an end to the

But if the risk be entire and be once commenced, there shall be no return.

(*a*) Vid. *Emerig.* tom. 1, p. 62, 63. *Pothier*, h. t. n. 179.

contract before the commencement of any part of the voyage insured (a).

A ship is insured "At and from A. to B. during her stay at B. and from thence to her port of discharge at C. and at and from C. back to A." The ship is taken before she arrives at C. There shall be no return of premium for the voyage from C. to A. this being one entire risk and one voyage.

Berman v. Woodbridge, Doug. 751.

An insurance was made on a *French* ship and her cargo, "At and from *Honfleur* to the coast of *Angola*, during her stay and trade there, at and from thence to her port or ports of discharge in *St. Domingo*; and at and from *St. Domingo* back to *Honfleur*; at a premium of "eleven per cent."—The ship sailed to *Angola*, and from thence, after staying some time there, to the *West Indies*. On her way from *Angola*, she put into *Cayenne*, on the coast of *America*, and from thence went to *Martinico*, confessedly out of the course to *St. Domingo*, where the captain was obliged to dispose of his cargo. The ship sailed for *Honfleur*; but was taken by a privateer on her voyage thither. As the deviation discharged the underwriters from the loss, the only question was, whether there should be a return of part of the premium. On the part of the plaintiff it was contended, that the voyage insured consisted of three distinct parts or voyages; viz. from *Honfleur* to *Angola*, from *Angola* to *St. Domingo*, and from *St. Domingo* to *Honfleur*; and that, as this last voyage had never been commenced, the premium ought to be apportioned, and the part of it returned which was paid to insure the risk from *St. Domingo* to *Honfleur*.—But the jury, upon that point, were clear that there ought to be no return.—Lord *Mansfield*, who tried the cause, upon turning the question in his mind, entertained some doubts upon it, and desired that a new trial might be moved for upon that ground.—This being done, the court, upon great consideration, determined that this was one voyage, and one entire risk; and that there could be no return of premium.—Lord *Mansfield*, in delivering the opinion of the court on this point, said;—"On the fullest

(a) By the ordinance of *Louis XIV.* h. t. art. 6, if an insurance be made on the outward and homeward voyage, at an entire premium, and the ship arrive at her outward port of destination, but never returns, the insurer shall return one third of the premium.

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consideration, and after looking into all the cases, (though my opinion has fluctuated), we are now all clearly of opinion that there ought not to be any return. The question depends upon this: Whether the policy be upon one entire risk on one voyage, or whether it is to be split into six different risks; for by splitting the words, and taking *at*, and *from*, separately, it will make six. The principles are clear. When the risk has never begun, there must be a return of premium; and if the voyages in this case are distinct, the voyage from *St. Domingo* to *Honfleur* never began. On the other hand, if the risk has once begun, you cannot sever it, and apportion the premium. In an insurance upon a life, with the common exception of *suicide and the hands of justice*; if the party commit suicide, or be executed in twenty-four hours, there shall be no return. The case is the same if a voyage insured be once begun. Is this one entire risk? The insured and insurers consider the premium as an entire sum for the whole, without division.—It is estimated on the whole at eleven *per cent.*, and which is extremely material, there is no where any contingency, at any period, out or home, mentioned in the policy, which happening, or not happening, is to put an end to the insurance. The argument must be, that if the ship had been taken between *Honfleur* and *Angola*, there must have been a return. By an implied warranty, every ship must be sea-worthy when she sails on the voyage insured; but she is not necessarily to continue so throughout the voyage; so that, if this be one entire voyage, if the ship was sea-worthy when she left *Honfleur*, the underwriters would have been liable though she had not been so at *Angola*, &c. but according to the construction contended for on the part of the plaintiff, she must have been sea-worthy, not only at her departure from *Honfleur*, but also when she sailed from *Angola*, and when she sailed from *St. Domingo*. The cases of *Stevenson v. Snow* (a),

The premium being entire, is a proof that the risk is entire.

(a) Sup. 565.

and *Bond v. Nutt* (a), were quite different from this. They depended on this, that there was a contingency specified in the policy, upon the not happening of which the insurance would cease. In *Stevenson v. Snow*, it depended on the contingency of the ship sailing with convoy from *Portsmouth*, whether there should be an insurance from that place or not. This necessarily divided the risk and made two voyages. In *Bond v. Nutt*, it was held that there were two risks upon the same principle. "At *Jamaica*," was one. The other, viz. "From *Jamaica*," depended on the contingency of the ship having sailed "on or before the first of August." That was a condition precedent to the insurance on the voyage from *Jamaica to London*. The two cases of *Tyre v. Fletcher*, and *Loraine v. Thomlinson*, are very strong; for, if you could apportion the premium in any case, it would be in insurances on time."

When the insurance is for a term, and the premium is entire, if the risk be begun, there shall be no return.

A ship, insured for 12 months and warranted free from capture, is captured within two months.—There shall be no return for the residue of the time.

Tyre v. Fletcher, Cowp. 666.

So, where the insurance is for a term specified in the policy, and for one entire premium; if the risk be begun, and an event happen immediately after which determines the contract, there shall be no return of premium.

Thus:—A ship was insured, "At and from *London*, "to any port or place wheresoever or whatsoever, for "twelve months, from the 19th of August 1776, warranted free from capture or seizure by the *Americans*." The premium was 9 l. per cent.—The ship was taken by an *American* privateer, about two months after she sailed.—The insured brought an action to recover a proportion of the premium for the residue of the time.—The court determined that the risk was entire; and, having been once begun, there could be no return of any part of the premium.—Lord *Mansfield* said,—“This case is stripped of every authority. There is no case, or practice, in point; and therefore we must argue from general principles applicable to policies of insurance. And I take it, there are two general rules established, applicable to this question. The first is, that where the risk has not been

(a) Sup. 255.

run, whether this be owing to the fault, pleasure, or will, of the insured, or to any other cause, the premium shall be returned; because a policy of insurance is a contract of indemnity; the underwriter receives a premium for running the risk of indemnifying the insured; and, to whatever cause it be owing, if he does not run the risk, the consideration, for which the premium was put into his hands, fails, and therefore he ought to return it. Another rule is, that if the risk has once commenced, there shall be no apportionment or return of premium afterwards: For though the premium is estimated, and the risk depends upon the nature and length of the voyage; yet, if it was commenced, though it be only for 24 hours or less, the risk is run; the contract is for the entire risk; and no part of the consideration shall be returned; and yet it is as easy to apportion for the length of the voyage, as it is for the time. If a ship had been insured to the *East Indies*, agreeably to the terms of the policy in this case, and had been taken 24 hours after the risk was begun, by an *American* captor, there is not a colour to say that there should have been a return of premium. So much, then, is clear; and indeed perfectly agreeable to the ground of determination in *Stevenson v. Snow* (a). For, in that case, the intention of the parties, the nature of the contract, the consequences of it, spoke manifestly two insurances, and a *division* between them. The first object of the insurance was from *London* to *Halifax*: But if the ship did not depart from *Portsmouth* with the convoy specified, then there was to be no contract from *Portsmouth* to *Halifax*. The parties, then, have said, "We make a contract from *London* to *Halifax*; but, on a certain contingency, it shall only be a contract from *London* to *Portsmouth*." That contingency not happening, reduces it, in fact, to a contract from *London* to *Portsmouth* only. The whole argument turned upon that distinction, and all the judges, in delivering their opinion, lay the stress upon the contract comprising two distinct conditions, and considering the voyage as being, in fact,

(a) Sup. 565.

two voyages: And this was the equitable way of considering it; for though it was at first consolidated by the parties, there was a defeazance afterwards, though not in words. I think Mr. Justice *Wilmot* put it particularly on that ground; but that was the opinion of the court. There was an usage also found by the jury in that case, that it was *customary* to return a proportionable part of the premium in such cases, but they could not say *what* part. The court rejected this, as a void *usage*, for the uncertainty; but they argue from it, that there being such a custom, plainly shewed the general sense of the merchants, as to the propriety of returning a part of the premium in such cases: And there can be no doubt of the reasonableness of the thing. There has been an instance put where the measure is by *time*, which seems to me to be very strong, and apposite to the present case; and that is, an insurance upon a man's life for twelve months: There can be no doubt but the risk there is constituted by the measure of time, and depends entirely upon it; for the insured would demand double the premium for *two* years that he would take to insure the same life for *one* year only. In such policies there is a general exception against suicide.—If the person put an end to his life the next day, or a month after, or at any other period within the twelve months, there never was an idea that part of the premium should be returned. A case of general practice was put by Mr. *Dunning*, where the words of the policy are, “At and from *provided* the ship “sails on or before the first of *August* (a); and Mr. *Wallace* considers, in that case, that the whole policy would depend upon the ship's sailing before the stated day. I do

If a man's life be insured for 12 months, with an exception of suicide, and he kill himself the next day; there shall be no return.

If an insurance be “at and from,” provided the ship sails on or before such a day:—Whether this be two risks, or only one entire risk.

(a) It must be owned that the case thus put has much of subtlety in it. One part of it seems repugnant to the other. Mr. *Wallace* appears to have given it the best answer it would admit of. The word *provided* makes the sailing on or before the first of *August* a *condition* upon which the contract is to take effect; and if this be so, the word “at” in the policy is quite nugatory.

not think so. On the contrary, I think, with Mr. *Dunning*, that cannot be. A loss in port, *before* the day appointed for the ship's departure, can never be coupled with a contingency *after* the day: But if a question were to arise about it, as at present advised, I should incline to be of opinion, that it would fall within the reasoning of *Stevenson v. Snow*; and that there were two parts, or contracts, of insurance, with distinct conditions: The *first* is, 'I insure the ship in port, provided she be lost before the first of *August*:' And, *secondly*; 'If she should not be lost in port, I insure her then, during her voyage, from the first of *August*, till she reach the port specified in the policy.' The loss in port must happen before the risk upon the voyage could commence; and *vice versa*, the risk in port must cease the moment the risk upon the voyage began (*a*).—Let us see, then, what the agreement of the parties is, in the present case. They might have insured from two months to two months; or in any less or greater proportion, if they had thought proper so to do: But the fact is, that they have made no *division of time* at all; but the contract entered into was one entire contract from the 19th of *August* 1776, to the 19th of *August* 1777; which is the same as if it had been expressly said by the *insured*; 'If you, the underwriter, will insure me for 12 months, I will give you an entire sum; but I will not have any apportionment.'—The ship sails, and the underwriter runs the risk for *two* months; no part of the premium, then, shall be returned.—I cannot say, if there had been a recapture before the expiration of the 12 months, that the policy would not have revived."

In the foregoing case Lord *Mansfield* intimated an opinion that where the premium is entire, it is one proof

Even if the premium for a year be computed at so much per month, yet, being a gross sum, it is not a monthly insurance.

(*a*) This extrajudicial opinion, seems to have been rather hastily delivered, or perhaps, not very accurately reported. See the case of *Meyer v. Gregson*, sup. 567. which seems to be nearly the case put by Mr. *Dunning*, and in which Lord *Mansfield* and the rest of the judges of the *King's Bench* decided that there should be no return of premium.

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that the risk is meant to be entire. In the following case; the court of *King's Bench* carried this idea still farther, and decided that if, upon an insurance for a year, a gross premium be given; but it is expressed in the policy to be *at so much per cent. per month*; this shall be deemed only a mode of computing the gross sum, and does not make the contract a monthly insurance.

A ship insured against capture for 12 months, is lost in a storm within two months. The premium is 9 per cent. and expressed in the policy to be at the rate of 15 s. per month; yet there shall be no return of premium.

Lovine v. Tomlinson, Doug.
564.

An insurance was made on a ship against capture only, for twelve months, in the coasting trade. The plaintiff underwrote 200 l. In the body of the policy it was stated, "That the insurers confessed themselves paid the consideration due to them by the insured, *at and after the rate of 15 s. per cent. per month.*" At the bottom opposite the plaintiff's subscription, was written, "Premium received the 15th of *March 1779*;" and on the back was indorsed,—"Newcastle 15th *March 1779*, Mr. *J. G. Thomlinson*, on his ship *Chollerford*, himself master; for twelve months, in the coasting trade, at and between *Leith* and the *Isle of Wight*, beginning the 13th of *March 1779*, and ending the 12th of *March 1780.*"—The premium was, in fact, not paid, is being the usage in *Newcastle* not to pay the premiums at the time of making insurances, but at certain times afterwards.—The ship was lost in a storm within the first two months; and the insured tendered the underwriter 3 l. as the premium for two months.—The underwriter brought his action against the insured to recover the whole premium of 18 l. The defendant pleaded the tender and paid the 3 l. into court.—The jury found a verdict for the plaintiff for the remaining 15 l. subject to the opinion of the court, whether he was entitled to his whole premium, or only to the 3 l. tendered, upon a case which, in substance, stated the above facts.—The court were clearly of opinion that the plaintiff was entitled to recover the whole premium.—Lord *Mansfield* said,—“This is a mere question of construction, on the face of the instrument, and therefore, parol evidence ought not to have been admitted to explain it. It is an insurance for 12 months, for one gross sum of 18 l. They have calculated this sum to be at the rate of 15 s. per month.

But

But what was to be paid down? Not 15 s. for the first month, and so from month to month; but 18 l. at once. Two cases have been mentioned. *Stevens v. Snow* (a), was decided on the ground of there being two voyages. *Tyrie v. Fletcher* (b), is directly in point against the defendant." He then repeated the two rules laid down by himself in this last case.

Sect. 3.

Upon the Performance of some Stipulation.

IT is frequently agreed between the parties that, upon the happening of certain events, or the performance of certain stipulations, the insured shall return a part of the premium; and clauses to this effect are often inserted in the policy. If, in such case, the event have happened, or the thing stipulated have been performed, the insured shall be entitled to the return of premium agreed upon, even though the insurer be obliged to pay a partial loss.

Thus:—An insurance was made,—“At and from any port or ports in *Grenada to London*, on any ship or ships that shall sail on or between the first of *May*, and the first of *August* 1778, at 18 guineas per cent. to return 8 l. per cent. if sails from any of the *West India* islands, with convoy for the voyage, and arrives.”—At the bottom of the policy there was written a declaration that it was on sugars, (the muscovado valued at 20 l. per hoghead) for account of L. Q.—The ship sailed with convoy within the time limited, having 51 hogheads of muscovado sugars on board belonging to L. Q. She arrived safe in the *Downs*, where the convoy left her as usual. She afterwards struck on a sand bank near *Margate*, and 11 of the 51 casks of sugar were washed overboard, and the rest damaged. The ship was afterwards got off, and arrived safe in the port of *London*. The sugars saved were

If part of the premium is to be returned upon the performance of some stipulation, this shall be returned though the insurer be obliged to pay a partial loss.

Goods are insured on any ship from *Grenada to London*, at 18 guineas per cent. to return 8 per cent. if sails with convoy and arrives.”—The arrival of the ship is what is meant, and the ship having sailed with convoy, the insured is entitled to a return of 8 l. per cent. on the sum insured, notwithstanding any partial loss on the goods.

Simond v. Bowdell, Doug. 255.

(a) Sup. 565.—(b) Sup. 574.

taken out at *Margate*; and after undergoing a sort of cure by a person sent from town for that purpose, they were carried to *London* in other vessels, and the 40 hogheads being sold, produced 340 l. instead of 800 l. their valuation in the policy.—An action was brought against the underwriters for a return of premium.—The defendant paid into court 8 l. *per cent.* on 340 l. The plaintiffs insisted that they were entitled to have 8 l. *per cent.* also returned on the valued price of the 11 hogheads of sugar, which were lost, and on the difference between what the remaining 40 hogheads produced, and their valued price.—At the trial, before Lord *Mansfield*, the plaintiffs had a verdict for their whole demand.—Upon a motion for a new trial the principal question was upon the effect of the word “*arrives*.”—For the plaintiff it was insisted that this word related only to the arrival of the *ship*. That, in policies of this sort, the intention is, that the underwriters shall take the war risk upon themselves; but that, if the vessel be protected by convoy from *that* risk, and actually arrives, they shall then return as much of the premium as was necessary to cover it.—On the other side, it was contended, that as the words of the policy must be applied to the subject matter of the insurance, which in this case was on the goods, not on the ship, the return of premium could, at most, be only on the value of the sugars which actually came to *London*; whereas, if the defendant must pay the valued amount of the sugars lost, and the difference between the valued price and the actual produce of the sugars saved, and also return 8 l. *per cent.* upon the whole, the insured would be considerable gainers by the loss.—The court determined that the arrival of the *ship* was what was meant by the policy; and that the plaintiff was entitled to a return of full 8 l. *per cent.* on the sum insured; notwithstanding the partial loss on the goods.—Lord *Mansfield*, after observing how very inattentive those who introduce additional clauses into policies are to their import, said;—“I do not doubt, however, how we are to construe this policy. Dangers of the sea are the same in peace and war: But war introduces hazards of another sort, depending on a variety of

Why it is sometimes provided that a part of the premium shall be returned in case the ship sails with convoy.

of circumstances; some known, others not, for which an additional premium must be paid. Those hazards are diminished by the protection of convoy; and if the insured will warrant a departure with convoy, there is a diminution of the additional premium. If the insured will not warrant a departure with convoy, he pays the full premium; and in that case, the underwriter says: "If it turn out that the ship do depart with convoy, I will return part of the premium." But a ship may sail with convoy and be separated from it by a storm, or other accident, in a day or two, and lose its protection. On a warranty to sail with convoy, that would not be a breach of the condition: But, to guard against that, the insured adds, in policies of the present sort; "The ship must not only sail with convoy, but she must arrive, to entitle you to the return." The words, "*and arrives*" do not mean that the ship shall arrive in the company of the convoy; but only that she herself shall arrive. If she do, that shews, either that she had convoy the whole way, or did not want it. But, in the stipulation for the return of premium, no regard is had by the parties to the condition of the goods, on the arrival of the ship. The construction contended for by the defendant is *adding a comment longer than the text*. If it had been meant that no return should be made, unless all the goods arrived safe, they would have said; "If the ship arrive *with all the goods*, or, *safely with all the goods*." The total or partial loss of the goods was the subject of the *indemnity*, and must be paid for by the underwriter. But, as to the return of the additional premium; whether the goods arrive safe or not, makes no part of the question. The single principle which governs is, that, in the events that have happened, the war risk has been rated too high."

The words "*and arrives*" in the policy only mean that the ship, not the goods, shall arrive.

So, where an insurance was made on the freight of the ship *Jackson*, "At and from *Jamaica* to *London*, warranted to sail on or before the 26th of *July* 1796, with convoy for the voyage, at the rate of 10 guineas *per cent*."

The insurer on a freight agrees to return part of the premium "if the ship sails with convoy and *arrives*."—The ship having

failed with convoy and arrived, the insured shall have the return, though the ship being captured and recaptured, the underwriters were obliged to pay salvage.

Aguilar and others v. Rodgers, 7 T. R. 421.

"to return 2 l. per cent. if she failed on or before the 1st of July 1796, and arrived."—Afterwards, by a memorandum indorsed on the policy, 15th August 1796, and signed by the underwriters, it was agreed, in consideration of 10 guineas per cent. additional premium, that the warranty of sailing with convoy should be annulled, and the defendant undertook to return 10 l. per cent. "if the ship sailed with convoy and arrived." The ship sailed from Jamaica on the 26th of July, with convoy, but separated in bad weather, and was captured on the 26th of October, recaptured on the 5th of November, and carried into Cork, where she was delivered up to the owners, on paying 9 l. 14 s. 7 d. per cent. for salvage. She afterwards arrived at the port of London with her cargo.—In an action on the policy, with counts for a return of premium, the defendant paid into court 19 l. 9 s. 2 d. the amount of the salvage on 200 l. his subscription.—The plaintiffs obtained a verdict for the premium, and, upon a motion to set it aside, the court determined that according to the true construction of the memorandum, the insured in this case was entitled to the return of premium there stipulated.—Lord Kenyon said,—“I agree with the defendant’s counsel, that every arrival of the ship at her port of destination, would not be an arrival within the fair construction of the memorandum; such, for instance, as an arrival in the possession of an enemy at a neutral port; or an arrival at her port in England, as the property of other persons after a capture. But, in order to satisfy the memorandum, it should be an arrival at the destined port, in the course of the voyage; and, in this case, the ship did arrive at the port of London, in the course of her voyage. It is now too late to controvert the authority of *Hamilton v. Mendez*, even if we were disposed so to do, which I am not, where it was holden that though the insured may abandon, on hearing of a capture, yet if they do not abandon, and the ship be afterwards recaptured, it must be considered as if she had never been out of the possession of the owners. It is 18 years since the case of *Simond v. Boydell* (a) was decided.

decided. That case must be well known in the commercial world; and if the parties in this case had intended to make an agreement different from that which the words used in this memorandum import, they would have added, after "*arrived*," the words "*safely from the enemy*" or some others to that effect. But the words here used are not equivocal, and we ought not to depart from them. It would be attended with great mischief and inconvenience if, in construing contracts of this kind, we were not to decide according to the words used by the contracting parties. On the grammatical construction of the words, which is the safest rule to go by, I am of opinion that the verdict ought not to be set aside."

A ship is insured at 12 guineas *per cent.* to return 6 l. if she sail with convoy from the coast of *Portugal* and arrive. She sails under convoy from *Oporto* for *Lisbon*, where the whole trade bound for *England* were to rendezvous, in order to sail together from thence. The ships going from *Oporto* to *Lisbon* being dispersed in a gale of wind; the ship insured ran for *England* and arrived.—It was determined that this sailing with convoy from *Oporto* for *Lisbon* was a sailing with convoy from the coast of *Portugal*, so as to entitle the insured to 6 l. *per cent.* return of premium.

If the insured be entitled to a return of premium in case the ship sail with convoy from the coast of *Portugal* and arrive; he will be entitled to this, if the ship sail with convoy from *Oporto* for *Lisbon*, to join another convoy there.

Andley v. Duff,
2 P. & B.
211. Sup. 289.

Sect. 4.

Of the Deduction of one-half per Cent. upon a Return of Premium.

AS the insurer can never, by his own act, discharge himself from the contract, it seems but reasonable that, where the insured thinks proper to put a stop to the adventure, and prevent the risk from ever commencing,

(s) Sup. 579.

he should make some compensation to the insurer for his trouble and disappointment; it is therefore the general custom in all the maritime countries of *Europe*, to allow him to retain one half *per cent.* (a).—This the *French* denominate *droit de signature*. *Pothier* (b) thinks it is given to compensate the insurer for the loss he sustains by the non-performance of the contract, by the act of the insured. *Emerigon* (c) says it is for his trouble in signing the policy, and making the proper entry in his books; and this is the reason given in *Le Guidon* (d).

It is allowed to the insurers where the contract is void for some radical defect, provided this was unknown to him when he entered into the contract (e). But if he was informed of the fault, or must have known it before he subscribed the policy; as if he were to insure a ship or goods when he knew of their safe arrival, or seamen's wages, or contraband goods, knowing them to be such, he could have no claim to this allowance (f).

Pothier holds that if the contract become void, not by the act of the insured, but by some cause which he could not prevent or control, the insurer shall not be entitled to the half *per cent* (g).—*Emerigon*, on the contrary, maintains that in all cases where the policy becomes void, without any fraud on the part of the insurer, he shall have this allowance (h).

(a) *Molloy*, b. 2, c. 7, § 12.—(b) h. t. n. 181.—(c) *Tom.* 2, p. 168.—(d) *Ch.* 2, art. 16.—(e) *Ord. of Antwerp*, art. 14, 2 *Mag.* 27.—(f) *Valin* on art. 10, 16, 17, h. t. *Pothier*, h. t. n. 183, *Emerig.* tom. 2, p. 169.—(g) *Pothier*, h. t. n. 181.—(h) *Emerig.* tom. 2, p. 169. Vid. *Le Guidon*, ch. 2, art. 16, *ord. of Amst.* art. 22. *ord. of Antwerp*, art. 16, 2 *Mag.* 27, 28.

C H A P. XVII.

Of the Proceedings in Actions on Policies of Insurance.

IN treating of actions on policies of insurance we will inquire,

1. In what courts they may be brought;
2. Of the declaration;
3. Of the plea, and bringing money into court;
4. Of the consolidation rule;
5. Of the trial.

Sect. 1.

In what Courts Actions on Policies of Insurance may be brought.

Insurance being a marine contract, the law which regulates it, is considered, in most of the commercial states of *Europe*, as a branch of marine law, and therefore, where no commercial tribunal is established, questions arising upon this contract, generally belong to the jurisdiction of the courts of admiralty (*a*). But I do not find that courts of admiralty have ever had jurisdiction in questions of insurance in this country (*b*). In a former part of this work (*c*) I took occasion to observe, that although the modes of administering justice in our courts of common law, are so well suited to the investigation and decision of all commercial questions; yet, that it was not till towards the end of Queen *Elizabeth's* reign, that actions upon policies of insurance began to be brought in the courts of *Westminster*; and that the legislature, even then, conceiving that questions upon this contract ought not to be litigated in those courts, being governed by cer-

The courts of common law have the sole jurisdiction in matters of insurance.

(*a*) Vid. *Emerig.* t. 2, p. 319.—(*b*) For this consult *Zouch* on the jurisdiction of the admiralty.—(*c*) Sup. 24.

tain rules unknown to the common law, erected a court for the sole purpose of determining such causes; but that, though the powers of this court were greatly enlarged in a subsequent reign, yet, it soon fell into disuse, and the determination of all questions arising out of this contract has long since exclusively belonged to the courts of common law.

Courts of equity have no jurisdiction in such cases.

Courts of equity have no more jurisdiction in cases of insurance than in those of the purest common law cognizance. They do, indeed, sometimes, in cases of insurance, as in all other cases, interpose their authority for the advancement of justice. That court will compel a trustee to permit his name to be used by the *cetui que trust* in an action on a policy of insurance (a); it will issue commissions for the examination of witnesses residing abroad, or out of the jurisdiction of the court, and grant injunctions to stay the proceedings at law till the return of such commissions (b); it will compel a party charged with fraud to make a full discovery upon oath of all circumstances within his knowledge which may lead to a discovery of the real facts of the case; and deliver up, or permit an inspection of, all papers and documents which are material to the matters in dispute.—But, except in such cases, it has been solemnly determined, that courts of equity have no jurisdiction in questions of insurance (c).

The parties cannot, by agreement to submit their differences to arbitration, oust the supreme courts of their jurisdiction.

It may be proper, in this place, to mention, that the authority of the supreme courts of *Westminster* is so transcendent, that nothing but the express words of an act of Parliament can take away or abridge their jurisdiction in any case (d); and therefore a clause inserted in a policy, that, in case of any dispute between the parties, it shall be referred to arbitration, is merely nugatory, for

(a) Per Lord Hardwicke, Ch. 1 Atk. 457.—(b) *R. Chitty v. Selwin*, 2 Atk. 359.—(c) *R. upon demurrer in Chancery*, and confirmed in the House of Lords upon appeal, *De Gheff v. Lond. Assur.* 3 Bro. Parl. Ca. 525; Per Lord Hardwicke, Ch. 1 Atk. 457.—(d) 2 Hawk. P. C. 286, 2 Bur. 1042.

without

without it, the parties may, if they think proper, submit their differences to arbitration; and with it, neither can *compel* the other to do so; for the agreement of the parties cannot oust the supreme courts of their jurisdiction (a). If, indeed, an award be actually made, it will be a bar to an action; or if the parties have submitted their differences to arbitration, and the reference be still depending, that, perhaps, may also be a bar (b).

Sect. 2.

Of the Declaration.

THE common policy of insurance, subscribed by private underwriters, being only a written undertaking, not under seal, is but a simple contract, and therefore *assumpsit* is the proper form of action to be brought upon it, against the underwriters. And as the action in such case is founded on a particular and express undertaking made upon a consideration, upon which the law would not, by necessary implication, raise the promise specified in the policy, the plaintiff must declare specially upon it.

Special *assumpsit* is the proper form of action against private underwriters.

In this, like every other case of special *assumpsit*, the contract must be set forth with precision; for any material variance or omission will be fatal (c).—The declaration must therefore recite the policy, (which is alleged to have been made according to the custom of merchants), with such warranties and stipulations as may have been introduced into it, with an averment that the defendant had notice of the policy.—It then alleges, that in consideration that the plaintiff had paid his premium to the defendant, and had promised to perform all things on his part to be done, the defendant promised to become an insurer for the sum subscribed by him, upon the terms mentioned in the policy, and that

Heads of the declaration.

(a) *R. Kill v. Hollister*, 1 *Wils.* 129.—(b) *Per Cur.* 1 *Wils.* 129, sed Q.—(c) *Vid. Glb. law of evld.* 193.

he would perform all things, on his part, as to that sum; and also that he had subscribed the policy as an insurer for that sum. That the insured was, at the time of the insurance; and at the time of the loss, interested in the ship or goods insured, to the amount of the value in the policy, if it be a valued one, or to the amount of the sums subscribed, if it be an open one.—It then states that the ship, &c. on a certain day was in good safety at her port of departure; that she sailed on the voyage insured within the time mentioned in the policy, if a time be limited for her sailing; and with convoy, if there be a warranty for her so doing;—and it likewise avers an exact compliance with every other warranty expressed in the policy.—The loss is then stated, which must appear to have been occasioned by some of the perils insured against; and this must be shewn with reasonable certainty, that the insurer may have notice of the case against which he is to prepare his defence.—Notice to the defendant of this loss, and a demand of the sum subscribed by him are then averred. And lastly, the breach of the contract by the non-payment of the sum subscribed by the defendant.

Count for money had and received.

It is not necessary to declare specially upon an adjustment. The insured may give it in evidence upon the usual declaration upon the policy.

This is the general outline of a declaration upon a common policy, subscribed by individual underwriters in an ordinary case. When there are any particular circumstances, it behoves the plaintiff to be careful to adapt his declaration to them.—It is usual to add a count for money had and received by the defendant to the plaintiff's use, to enable the plaintiff to recover back his premium, if, under all the circumstances, he should appear to be entitled to that only.

When a loss has been adjusted, and the adjustment signed by the insurer in the usual manner, the insured, in order to recover this loss, is not obliged to declare specially upon the adjustment as upon a new contract; but may declare upon the policy in the usual manner, and give the adjustment in evidence, which, as we formerly observed (a), is equivalent to an admission,

(a) Sup. 542.

though

though not conclusive, of all the facts necessary to be proved, to entitle the insured to recover upon the policy (a).

The *averment of interest* in the insured may be either general or special. Under a general averment of interest the plaintiff may give in evidence any interest he may have in the thing insured. But if the interest be averred specially, it must be proved as stated. The general averment is, therefore, in most cases, to be preferred. Nor can I see any necessity for a special averment, unless the question of interest be the only matter in dispute between the parties, and the plaintiff means to put this upon the record (b).

The averment of interest may be either general or special.

The general averment is sufficient, not only as to the *title or claim* of the insured, but also as to the *quantum of interest*. In assumpsit the plaintiff recovers damages according to the evidence, *pro tanto*; and, therefore, if he aver interest generally, in the entire thing insured, he shall recover for the loss in proportion to the *quantum of interest* he proves (c).

But the general averment is sufficient not only as to the *title*, but also as to the *quantum of interest*.

If the insurance be made in the name of an agent, the action may be brought either in his name or in the name of the principal; and in either case it must be averred that the policy was made in the name of the agent, as agent, for the use of the principal, who is averred to have been interested in the ship or goods insured, to the amount of the sum insured, or the value in the policy.

If the insurance be in the name of an agent, it must be averred for whole use.

In averring interest in the insured, it is sufficient to shew it to have been in those who had the property *at the time of making the policy*.—Therefore, where it was averred in the declaration, that *P. Maingy and N. Maingy*,

In averring the interest, it is sufficient to shew it to have been in those who had the property at the time of making the insurance.

(a) Per Lord Kenyon, at *N. P. Rodgers v. Maylor*, sup. 544.
—(b) See the case of *Crawford v. Hunter*, sup. 85, where the interest was specially averred, probably to bring the question of interest, which, in that case, was a mere question of law, to an immediate decision upon demurrer.—(c) *R. Rising v. Barnet*, inf.

Perched v. Whitmore, at N. P. after Mich. 1786, 2 *Pul. and Rep.* 155 n.

until, and at the time of making the policy, and also at the time of the loss, were interested in the goods mentioned in the policy; and that the said insurance was made for the said *P. M.* and *N. M.*, and for their account. In the course of the cause it appeared that Mr. *Le Mesurier* had, since the policy was effected, become a partner with *P. M.* and *N. M.*, and had taken a share of all the stock, including the goods insured. Upon this it was urged on the part of the defendant, that the plaintiff should be nonsuited; for as Mr. *Le M.* was interested in the goods insured, the averment of interest in the declaration was disproved.—But Mr. Justice *Buller*, who tried the cause, said, he thought the plaintiff ought not to be nonsuited; for that Mr. *Le M.* was not interested at the time of making the policy, to which the averment of interest related, and the plaintiff brought the action for those who were interested at the time.

In this case it seems to have been taken for granted, that if Mr. *Le M.* had been a part owner at the time the policy was effected, the plaintiff must have been nonsuited. Yet the following case shews that, even in that case, the averment would be sufficiently supported by the evidence.

A cargo is purchased by *A.* who parts with a share in it to *B.*, and afterwards insures it on his own account; *A.* may aver interest in himself alone. The fact of *B.*'s having been let into a share in the adventure, does not negative the averment, *A.* having still an interest in the entirety of the cargo.

Rogers v. Fry,
2 *Pal. and Esf.*
240.

A policy was effected on a cargo of corn by the plaintiff, as agent to Messrs. *Hyde* and *Hobbs*.—In the declaration on this policy, it was averred that *Hyde* and *Hobbs* were, at the time of loading the said corn on board the said ship, and at the time of subscribing the policy, and also at the time of the loss, interested in the said corn, to the amount of all the money insured thereon, and that the said policy so made in the name of the plaintiff, was made for the use, risk, benefit, and account of the said *Hyde* and *Hobbs*.—Upon the trial before Lord *Eldon*, it appeared that after *Hyde* and *Hobbs* had purchased the corn on their own account, they, thinking the engagement might be too large for them, offered another house a share in the corn, which was accepted: *Hyde* and *Hobbs* having informed the plaintiff of this, directed him to effect the insurance on the cargo. *Hyde* and

and *Hobbs* paid for the cargo, and invoices were made out to them.—It was objected, on the part of the defendant, that this evidence negatived the averment in the declaration, that the whole interest was in *Hyde* and *Hobbs*.—Lord *Eldon*, however, directed a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit.—Upon that motion, the court were clearly of opinion that *Hyde* and *Hobbs* had an interest in the *entirety* of the cargo, sufficient to support the averment in the declaration, notwithstanding other persons had a beneficial interest in part.

It has been holden (a) that before the stat. 19 G. II., c. 37, insurances without interest were not illegal; and that, before that act, it was unnecessary to aver interest in the insured in any case, and consequently that ever since that act, it is not necessary to aver interest in any case not prohibited by it.

Whether it be necessary to aver interest in a case not prohibited by the 19 G. II., c. 37.

Therefore, where commissioners, appointed under the stat. 35 G. III., c. 8, § 21., were authorized to take into their possession and care all *Dutch* ships and effects brought into, or detained in the ports of *Great Britain*, and to dispose thereof according to such directions as they might receive from the privy council; it was determined that these commissioners might insure, in their own names, the ships and effects thus put under their care, while they were on their passage to this country; and that a count stating the nature of their trust, and averring an interest in them, as such commissioners, was good.—In the same case it was also determined, that a count averring that the ships insured did not, at the time when the insurance was effected, *belong to his Majesty or any of his subjects*, was likewise good, without any averment of interest (b).

Commissioners for the care of foreign ships and goods seized by the King, may insure in their own names, and declare on their own interest.

As the fact of the loss is often the principal matter in dispute, it is necessary to state the true cause of it, with reasonable certainty, that it may appear to be a loss within the policy, and for which the defendant is liable;

The loss must be averred to have arisen from the true cause, and no other.

(a) Sup. 103.—(b) *R. Craufurd v. Hunter*, 8 T. R. 113, sup. 85.

and also, that he may have notice of the case which he is called upon to answer.—Therefore, if, in a declaration upon a policy without interest, the loss be averred to have been occasioned by *capture*, when, in fact, the ship was released from the capture, and might have proceeded on her voyage; the insured cannot recover; for the ship might have reached her destined port, which was the event insured.—Had it been a policy upon interest, the insured might have abandoned, and then the averment of a loss by capture would have been good.

A ship insured, interest or no interest, is captured, but afterwards let at liberty in a condition to pursue the voyage insured; but instead of that, sails on a different voyage, and is lost. The insured cannot recover as for a loss by capture.

Kulen Kemp v. Figne, 1 T. R. 304, sup. 106.

Therefore where goods were insured on board the ship *Emanuel*, at and from *Falmouth* to *Marseilles*, interest or no interest, warranted a *Danish* ship.—In declaring on this policy it was averred that, “Whilst the ship was proceeding in her voyage from *Falmouth* to *Marseilles*, and before she could arrive at *Marseilles*, she was captured by the *Spaniards*; and thereby the said ship, and also the goods and merchandizes on board her, were totally lost to the plaintiffs.”—Upon the trial it appeared, that the ship was taken by a *Spanish* privateer and carried into *Ceuta*, where she was condemned, but, upon appeal, was afterwards released, and in a condition to pursue her voyage; but instead of proceeding to *Marseilles*, which she might have done, she first sailed to *Málaga* to refit, and from thence she went on a voyage to *Bremen*, and in that voyage was lost.—On the trial it was objected, on the part of the defendant, that the plaintiffs could not recover upon this form of declaring, for a loss by capture; for though the vessel was captured, yet having afterwards been restored, she might have reached her destined port, in which case the underwriters would have been discharged by the terms of the memorandum; that if this had been a policy upon interest, the averment that the ship was lost by capture would have been good; because, in that case, the insured might have abandoned. But this being a wager policy, and the event insured against being the non-arrival of the ship at *Marseilles*, the insured could not abandon (a).—Mr. Justice Buller, who

(a) Vid. *Fitzgerald v. Pole*, 5 Bro. Parl. Ca. 131. Sup. 504. tried

tried the cause, being of this opinion, nonsuited the plaintiffs.—Upon a motion to set aside this nonsuit, it was contended on the part of the plaintiffs, that the object of the voyage was defeated by the capture; that the moment the voyage was defeated, the insurers became liable, and after that, it was immaterial what course the ship took.—But the court adopted the same opinion, upon which Mr. Justice Buller had nonsuited the plaintiffs, and held that this could not be averred to be a loss by capture; because, after the capture, the ship might still have proceeded to *Marseilles*, which was the event insured.

So, if a mob of rioters board a ship, for the purpose of obliging the captain to sell a cargo of corn at an inferior price; and in consequence of this boarding, the ship be stranded, and a quantity of the corn lost: This is a loss by *stranding*, within the usual memorandum, and, in an action on a policy on the corn, it must be so laid in the declaration; nor could the insured recover in this case, upon a count for a loss by *detention of people*; because this mob did not constitute a *people* within the meaning of the policy: Neither could the insured recover for a loss by *pirates*; because, this being a policy on *corn*, the insurer was liable for no partial loss, unless it were a *general average*, or the ship were stranded; and this was not a general average, because the whole adventure was never in jeopardy; for the persons who took the corn intended no injury to the ship, or any part of the cargo but the corn.

The cause of the loss must be stated according to the truth of the case. The defendant has a right to insist upon this, in order that he may have an opportunity of demurring, or moving in arrest of judgment, if it be not sufficiently averred. If, therefore, a loss happen in consequence of the captain's mistaking his course, and in the declaration it be alleged that it arose from *the perils of the sea, contrary winds, and other misfortunes*; the plaintiff cannot recover.

If rioters board a ship and occasion a *stranding*, the loss cannot be recovered on a count for *detention of people*, or for a loss by *pirates*, but only upon a count for a loss by *stranding*.

Nesbitt v. Lushington, 4 T. R. 723. sup. 147, 426.

If a loss happen in consequence of the captain's mistake, this cannot be declared upon, as for a loss by the perils of the sea.

Q. 9

Thus:

The captain of a slave ship mistakes his course, whereby a scarcity of water ensues, and a number of the slaves are thrown overboard to save the rest. It is not sufficient to state in the declaration that, by contrary winds, currents, &c., the ship was retarded, and the slaves perished for want of water.

Gregson v. Gilbert, B. R. 23
G. Ill, Park 62.

Thus :—In a declaration on a policy on slaves it was stated, —“ That, by the *perils of the sea, contrary winds, currents, and other misfortunes*, the voyage was so much retarded, “ that a sufficient quantity of water did not remain for the “ support of the slaves and other people on board, and that “ a certain number of the slaves *perished for want of water*.”

—Upon the trial it appeared that the ship, being bound from *Guinea to Jamaica*, had missed the island, and that the crew were reduced to great distress for want of water : That the captain consulted with the crew, and it was unanimously agreed upon, that some of the slaves should be thrown overboard, in order to preserve the rest ; and that, at the time this resolution was formed, there remained but one day’s full allowance of water at two quarts *per man*. The jury, upon this evidence, found a verdict for the plaintiff, with 30 l. a-head for every slave thrown overboard.—The court, upon a motion, granted a new trial, being of opinion that the declaration did not state the loss according to the truth of the case.—Lord *Mansfield* said,—“ This is a very uncommon case, and deserves further consideration. There is great weight in the objection, that the loss is stated in the declaration to have arisen from the *perils of the sea*, and that the currents, &c. had made the ship foul and leaky. Now, does it appear by the evidence that the ship was foul or leaky ? On the contrary, the loss happened by mistaking *Jamaica* for another place.”—Mr, Justice *Buller* said ;—“ The declaration does not, in any part of it, state the loss which has been the occasion of this demand ; and it would be very mischievous if we were to overturn this objection. Suppose, for a moment, that the underwriters, in some cases, are liable for the *mistake* of the captain ; yet, if they are not liable in others, the nature of the loss must be stated in the declaration, that the defendant may have an opportunity of moving in arrest of judgment, if it be not sufficiently alledged. But it would be impossible for the defendant, in this case, to move in arrest of judgment ; for the facts of the case, as proved, are different from those stated in the declaration. The point of law in arrest of judgment cannot be argued from the

the facts stated on the record; and the declaration in this case states the loss to have happened by the perils of the sea."

In stating the cause of the loss, the best way is to alledge it, as nearly as may be, in the words of the policy: As if the loss be by *barratry*, it ought regularly to be stated to have been occasioned "by the *barratry of the master and mariners*." But it will be sufficient if it be stated in words which import the same thing.

But the loss need not be stated in the very words of the policy.

Thus, where it was alledged that, *per fraudem et negligentiam magistri, navis prædicta depressa et submersa fuit, et totalitur perdita et amissa fuit, et nullius valoris devenit*:—It was objected that this was not within the meaning of the word *barratry*, and that the allegation should have been express, that the ship was lost by the *barratry of the master*; and that, though *barratry* may import *fraud*, yet it does not import *neglect*.—But the court were unanimously of opinion that there was no occasion to aver the fact in the very words of the policy; but if the fact alledged came within the meaning of the words, it was sufficient.

If the declaration alledge the loss to have happened by the fraud and negligence of the master; this is a sufficient allegation of *barratry*.

Knight v. Cambridge, 2 Ld. Ray. 1349; 1 Str. 581; sup. 312.

Where salvage is to be recovered it is not necessary to declare for salvage, *eo nomine*. It is sufficient to state the accident or injury which occasioned that charge, without stating specially the particular circumstances which led to it.

Where salvage is to be recovered, it is sufficient to state the injury which occasioned it.

Thus:—The plaintiff declared, "that the ship *sprung a leak and sunk* in the river, whereby the goods insured were spoiled:—The evidence was, that some of the goods were spoiled, and some saved; and the question was, whether the plaintiff might give in evidence the expence of *salvage*, that not being particularly laid in the declaration as a breach of the policy.—Lord Hardwick, C. J. said;—"I think it may be given in evidence; for the insurance is against all accidents. The accident laid in the declaration is, that the ship sunk in the river; it goes on and says, that, by reason thereof, the goods were spoiled, which is the only special damage laid: Yet it is but the common case of a declara-

Carey v. King, Ca. Temp. Hard. 304.

tion that lays special damage, when the plaintiff may give evidence of any damage that is within the cause of action as laid; and though it was objected that such a breach of the policy should be laid, as that the insurer may have notice to defend it; it is so in this case, for they have laid the accident, which is sufficient."

Only debt or covenant will lie on the policies of the two insurance companies.

The two insurance companies being corporations can do no act but by deed under their common seals. Their policies of insurance, therefore, being under seal, no action of *assumpsit* will lie upon them, but only debt or covenant.

The 6 G. I. c. 18. prescribes a form of declaring in debt.

By the stat. 6 G. I. c. 18. § 4., each of these companies is directed to provide such a stock of ready money as shall be sufficient to answer all just demands upon their policies for any losses that may happen, and to pay the same from time to time, according to the tenor of their policies: "And in case of refusal, the insured may 'bring his action of *debt*, or *on the case* (a), bill, suit, or 'information for the money demanded, against the corporation refusing to pay as aforesaid, in any of his Majesty's courts of record at *Westminster*.—And in such 'action the plaintiff may declare, "*That the same corporation is indebted to him in the money so demanded, and 'have not paid the same according to this act;*" and 'thereupon the plaintiff or plaintiffs shall recover against 'the same corporation double damages besides full costs 'of suit.

This last clause absurdly subjected these companies to double damages, besides costs, in actions which they could not prevent or avoid, for want of a provision in the act to oblige the insured to make discovery of his loss before action brought. This being found to encourage suits for the sake of double damages was soon repealed by

(a) This act must have been drawn by some person very little skilled in legal forms. An action *on the case* is here given on their policies *under seal*; and this is followed by a form of declaring in *debt*.

a clause

a clause in a subsequent statute. These corporations are now, therefore, only liable to pay their losses in the same manner as private underwriters (a).

If the venue in the declaration be laid in a wrong county, the court, upon motion, will change it to the county where the policy was made (b), unless it be by deed; in which case the court will not change the venue, without some special ground being laid to induce them to depart from the general rule (c).

The venue may be changed if wrong laid, unless it be by deed.

If the insured seek only to recover back his premium, the proper form of action is *indebitatus assumpsit*, for money had and received by the defendant to the use of the plaintiff.

The premium may be recovered back in an action for money had and received.

Sect. 3.

Of the Plea, and bringing Money into Court.

THE most usual plea to an action on a policy of insurance is the general issue, *non assumpsit*; which not only puts in issue every fact alledged in the declaration, but also enables the defendant to give in evidence any matter that goes to disaffirm the contract, or to discharge the plaintiff's demand under it (d).—If, therefore, the defendant would dispute the legality or the validity of the policy; if he would deny the interest of the insured, and shew the policy to have been a wagering one; if he would prove that the insured has been guilty of misrepresentation, concealment, or any other fraud; that the ship was not sea-worthy; that the voyage insured was not the voyage intended; that the ship failed

In what cases the general issue is the proper plea.

(a) Vid. stat. 8 G. I, ch. 30, § 25.—(b) And. 66, 2 Str. 1180. Say. Rep. 7, 2 T. R. 275.—(c) 1 T. R. 781.—(d) Doug. 106, 7. Vid. Bul. N. P. 152.

on a different voyage from that described in the policy; that there had been a deviation; that no loss, or at least not to the amount claimed by the plaintiff, had happened,—the general issue is the proper plea (a).

Under the general issue, the defendant may shew non-performance of a warranty.

Though the compliance with every warranty expressed in the policy, or implied in the contract, is an affirmative which it is incumbent on the plaintiff to prove; yet, in answer to the general evidence by which such compliance is often proved, the defendant may, under the general issue, prove a non-compliance: As, that the ship did not sail with convoy; that she never obtained sailing instructions, or had unnecessarily quitted the convoy; that she was enemy's property, though warranted neutral; that she had forfeited her neutrality, &c.

Or that the insurance was double.

So the defendant may shew that it was a double insurance, and that the plaintiff had already recovered to the amount of his interest against the underwriters in

(a) In the case of *Goram v. Sweeting*, (2 Saund. 205), the defendant, to a declaration for a total loss by the perils of the sea, pleaded that the ship arrived safe; “*absque hoc*, that the ship, her tackle, apparel, and furniture, were sunk in the sea and lost.”—Upon demurrer to this plea, it was objected that the traverse being in the conjunctive, if issue had been taken on it, and so much as an anchor or cable had been saved, the defendant would have been entitled to a verdict, though every thing else had been lost.—The court gave judgment for the plaintiff.—*Saunders*, who was counsel for the defendant, and probably drew the plea, concludes his report in much displeasure at the judgment of the court, who, he says, *decided without much consideration, or well understanding the case*. The plea was one of those artful expedients to gain an unfair advantage, in which the bar, in *Saunders's* time, was very fertile. Special pleas in assumpsit are now quite exploded. The plea of *non assumpsit*, which puts in issue every material allegation in the declaration, and under which the defendant may prove whatever shews that, *ex equo et bono*, the plaintiff has no right to recover, is now the only plea ever pleaded in actions on policies of insurance, which are meant to be tried upon the merits only.

another

another policy, to whom the defendant has made contribution (a).

To enable the defendant to discover whether there be a double insurance in any case, he may, under the stat. 19 G. II. c. 37, § 6, call upon the plaintiff to declare in writing, within 15 days, what sums he has insured in the whole, and how much he has borrowed on bottomry or respondentia, for the voyage in question or any part of it (b).—It is a little singular, however, that this act provides no means of compelling the plaintiff to deliver this declaration, nor any punishment for delivering a false one. The court would, probably, after the expiration of the 15 days, stay the proceedings till a satisfactory declaration were delivered. An action would, perhaps, lie at the suit of the insurer against the insured, either for refusing to make such declaration, or for delivering a false one (c).

By stat. 19 G. II. c. 37. the insured must disclose how much he has insured in the whole.

Where the question between the parties is, not whether the underwriters be liable to pay any thing to the insured, but only *how much* they shall pay, it will be advisable for them to *tender*, before any action brought, the sum which, under all the circumstances, they conceive to be fully sufficient to satisfy every fair claim of the insured. When such tender has been made and rejected, it may be pleaded, with non-assumpsit as to the residue of the plaintiff's demand.—The plaintiff, by his replication, may either deny the tender; or confess it, and join issue on the plea of *non assumpsit* as to the residue, and upon that issue proceed to trial for further damages.—When the underwriter, in such case, has omitted to make a tender before process has been sued out against him, he should *bring the money into court* (d).—Before the stat. 19 G. II. c. 37., it would seem that this was not permitted in actions on policies of insurance; and yet, in *assumpsit*, and covenant for the payment of money, and in debt also, even where the plaintiff might have recovered less than the sum de-

When the defendant may plead a tender.

When he shall bring money into court.

(a) Vid. sup. ch. 4, § 4.—(b) Vid. sup. 121.—(c) Vid. 2 Inst. 74, 104. F. N. B. 161.—(d) Vid. sup. ch. 16, § 1.

manded, this practice had been allowed long before (a). But now the above act (§ 7.) provides, 'that in debt, covenant, or any other action on any policy of insurance, the defendant may bring into court any sum or sums of money; and if the plaintiff shall refuse to accept the same, with costs to be taxed, in full discharge of such action; and shall afterwards proceed to trial, and the jury shall not assess damages exceeding the money brought into court; the plaintiff shall pay the defendant in such action, the costs to be taxed.'

Whether alien enemy ought to be pleaded or given in evidence under the general issue.

It has been already shewn that no action can be maintained on any policy of insurance on the property of an alien enemy, either at his own suit, or on his behalf (b). If, therefore, an action on a policy be meant to be defended on that ground, it may be specially pleaded in bar, being matter of law which does not go to the gist of the action, but only to the discharge of it (c).—From the report of the judgment, delivered by Lord Kenyon in the case of *Brandon v. Nesbitt*, it would seem that, in his lordship's opinion, this is merely a temporary disability, which only lasts to the end of the war. This is unquestionably true, when the insurance has been effected before the commencement of the war; because the contract would then be clearly legal, and the remedy only suspended. But whether this would be the case, if the contract were made during the war, is not quite so clear (d).

The two insurance companies may, to debt, plead *nil delicti*, and to covenant, *non infregit conventionem*; and the jury may give the whole, or such part of the sum insured as, the plaintiff is entitled to recover.

As to the two insurance companies, though the clause of the stat. 6 G. I. c. 13. § 4. which gave double damages against them, was repealed by the stat. 8 G. I. c. 30. § 25.; yet the form of the policy remained, and it was still necessary to sue them either in debt or covenant; from whence this inconvenience arose, that

(a) 5 Mod. 212, 1 Vent. 356, 2 Salk. 596, 7. 1 Lord Ray. 255.—(b) Vid. sup. ch. 2, § 1.—(c) In the case of *Brandon v. Nesbitt*, 6 T. R. 23, sup. 36. it was pleaded; but in *Brislow v. Towers*, 6 T. R. 35, sup. 37. the defendant pleaded the general issue, and the fact was found by the special verdict.—(d) Vid. sup. ch. 2, § 1.

these companies, when sued, were obliged to plead specially (a); because the general issue, *non est factum*, only puts in issue the existence of the instrument upon which the plaintiff declares (b). The consequence must have been, that the parties were often entangled in the intricacies of pleading; and even when an issue was at length joined, it frequently happened that the whole merits could not come in question, and the jury were obliged to find a verdict for the whole sum insured, though in justice only a small part of it was due. This drove the defendants to seek relief in courts of equity, when the matter in question might as well have been determined at once by the jury, in like manner as in the case of private insurers (c).—To remedy this inconvenience, the stat. 11 G. I. ch. 30. § 43. provides,—‘ That in all actions of debt against either of the said corporations, upon any policies of insurance under their common seal, it shall be lawful for them to plead generally *that they owed nothing* to the plaintiff in such action; and in actions of covenant upon such policies, to plead generally, *that they have not broke the covenants* in such policy contained, or any of them. And if issue be joined thereupon, it shall be lawful for the jury, if they see cause, to find a verdict for the plaintiff, and to give such part only of the sum demanded, if in debt, or so much damages,

(a) If the form of declaring mentioned in the stat. 6 G. I. c. 18. § 4. (which does not mention or even refer to the policy), had been adopted in actions against these companies, the inconveniences here enumerated might have been avoided; because, to such a declaration the defendant might have pleaded *nil debet*, and upon that plea the parties might have gone to trial upon the merits, whatever those merits might have been, in like manner as upon the general issue in an action of *assumpsit* upon a common policy. But, unfortunately, plaintiffs were not *compelled* by the statute to adopt the form of declaration therein given; and they, or at least their attorneys, were too much interested to pursue a different course.—(b) 5 Co. 119.—(c) Vid. recital to the stat. 11 G. I. c. 30. § 43.

‘ if in covenant, as it shall appear to them, upon the
 ‘ evidence, such plaintiff ought in justice to have.’

Sect. 4.

Of the Consolidation Rule.

The necessity of
 consolidating ac-
 tions on policies
 of insurance.

We have already seen that the underwriters on common policies only bind themselves *severally*, that is, each for the amount of his own subscription, and not jointly; because it would be impossible to find any number of underwriters who would be willing to bind themselves for each other, as they must do if the contract were *joint*; and, indeed, since the establishment of the insurance companies, such a policy would be void by the stat. 6 G. I. c. 18 (a). Hence the insured, even if he were so disposed, cannot bring a joint action against all the underwriters on a common policy, but must seek his remedy by a separate action against each. This, though it necessarily results from the form of the contract, was a subject of complaint so long ago as the time of Queen Elizabeth (b); and it cannot be denied that it enabled the insured, if his demand were disputed or delayed, to proceed to trial in all the actions, however small his demand might be against each underwriter, and thus subject each to the entire costs of an action. They therefore often found it to be the wiser policy, rather to submit to an unjust demand, than subject themselves to such heavy charges. Sometimes, indeed, they sought relief in courts of equity, which granted injunctions to stay the proceedings in all the actions but one, the defendants in the rest undertaking to pay, according to their subscriptions, if the plaintiff should recover in that one.

This was formerly
 done by
 courts of equity.

(a) Sup. 41.—(b) Vid. the preamble to stat. 43 Eliz. c. 13, sup. 24.

This being found to be very inconvenient, and little less expensive than the oppressive proceeding against which the underwriters sought relief, an attempt was at length made by Mr. Serjeant *Eyres*, in the year 1731, in a case where 28 actions had been brought on a policy, to stay the proceedings in all but one, the defendants in the rest entering into a rule of court that those causes should abide the event of that one. But the plaintiff refusing to give up his advantage and consent to such a rule, the court declared they could do nothing in it (a). —It has been said (b) that “Mr. Justice *Denison* intimated, that if the plaintiff persisted, against his own interest, in his right to try all the causes, the court had the power of granting imparlances in all but one, till there should be an opportunity of trying that one action; that Lord *Mansfield* then stated the great advantage resulting to each party by consenting to the application which was made; and added that, if the plaintiff consented to such a rule, the defendant should undertake not to file any bill in equity for delay, nor to bring any writ of error, and should produce all books and papers that were material to the point in issue; and that this rule was afterwards consented to by the plaintiff.” —It is not precisely stated when, or upon what occasion, this passed. From the manner in which it is introduced, it would seem as if it had passed in the above case of — *v. Glover*. But neither Mr. Justice *Denison* or Lord *Mansfield* was a judge till many years after that case. It is extremely probable that after Lord *Mansfield* came to preside in the court of King’s Bench, he and Mr. Justice *Denison* did, upon some occasion, express sentiments similar to those ascribed to them; because it is well known that Lord *Mansfield*, soon after his coming into that court, first established the consolidation rule, and settled the practice upon it in its present form. It is singular, however, that Sir *James Burrow*, who has

First attempt to do this in a court of law.

(a) Vid. — *v. Glover*, Hil. 5 G. II, 2 *Barnardist*. 103.

—(b) *Park* introd. p. 50.

reported the decisions of the court of King's Bench for many years after Lord *Mansfield* came to preside there, has published no report of the case in which so important an alteration of the practice first took place.

The nature of the rule, and the terms on which it is usually made.

Be this as it may, it is now the constant practice, where a number of actions are brought upon the same policy, to consolidate them by a rule of court, which restrains the plaintiff from proceeding to trial in more than one, and binds the defendants in all the others to abide the event of that one. But this is done upon condition that the defendant shall not file any bill in equity, or bring any writ of error, for delay.

Mutual admissions.

But beside these, the court, upon a proper ground being made by the plaintiff, will impose any other terms upon the defendants, which, under all the circumstances, appear reasonable: As, that they shall produce at the trial, all books, papers, &c. in their custody, material to the point in issue; that the defendant in the action to be tried shall admit his subscription to the policy, the interest of the insured, the loss, or any other fact, upon which the question intended to be tried does not turn, or which is not meant to be seriously disputed. But the court will not impose any terms on the defendant out of the ordinary course, without his consent, which, however, a defendant, who only means to litigate fairly and honourably, will never refuse, when it is only to save the trouble and expence of proving facts which are not disputed. On the other hand, the court, in consideration of these unusual concessions, will impose any reasonable counter-terms on the plaintiff, which the defendant may have to propose.

It is never made a part of the rule that the plaintiff may try the other causes if he please.

It is no part of the consolidation rule that the plaintiff shall be at liberty to try the other causes if he please. Such a liberty would defeat the end proposed by the consolidation rule; and, therefore, if the plaintiff will not consent to the rule without this term, the court will grant imparlances in all the causes but one till he consents (a).

(a) Per Cur. *Brown v. Newnham*, E: 25 G. III. B. R. MS.

Thus

Thus has a practice, which was often attended with ruinous consequences to the one party or the other, at length, by the wisdom of the judges, been converted into an effectual means of obtaining substantial justice for both, at a moderate expence, in cases where the obstinacy or dishonesty of plaintiffs might, before this regulation took place, have rendered that almost impossible. —On the one hand, the court may stay the plaintiff's proceedings for any length of time, if, through perverseness or the cunning of his illiberal advisers, he refuse his consent to consolidate the actions upon proper terms. If, on the other, the defendants will not accede to such terms, the court, to punish them, may permit all the actions to proceed.

Benefits resulting from this rule.

But though, by the rule, the defendants undertake to be bound by a verdict in the action which is to be tried; yet, this must be understood to mean such a verdict as ought to stand, as a final determination of the cause. It is certainly very beneficial to the parties that there should be but one trial for all the underwriters on the policy; but then that trial should be a satisfactory one (a). And therefore, if the plaintiff obtain a verdict; but the defendant apply for and obtain a new trial, the other defendants shall not be obliged to pay their money till the ultimate decision of the cause in favour of the plaintiff (b). And in cases of insurance, therefore, the courts should, in general, be less strict, and sometimes grant new trials upon less decisive grounds, than in other cases.

All the defendants are bound by the verdict in the cause tried; but that ought to be a satisfactory one.

By the terms of the consolidation rule, the defendants are bound generally not to bring any writ of error; the meaning of which is, that, after a fair trial, and substantial justice has been done, no writ of error shall be brought, though manifest error appear on the face of the record. For even then, the writ of error being against the justice of the case, the court will hold the

If an attorney sue out a writ of error, though for manifest error, this will be a breach of the rule.

(a) Per Lord Mansfield, 1 Bl. 464.—(b) R. *Hodgson v. Richardson*, 3 Bur. 1477.

party strictly to the terms of the rule by which the plaintiff has been prevented from proceeding in the ordinary course of law. If, therefore, under such circumstances, the defendant's attorney bring a writ of error, the court will grant an attachment against him for his contempt in such a breach of the rule (a).

Sect. 5.

Of the Trial.

Proof of the
plaintiff's case.

IF the parties proceed to trial upon the general issue, which most frequently happens, the plaintiff, as has been already observed, must, as in all other cases, begin by proving every material allegation contained in his declaration.—If any of the facts of the case, on either side, have been agreed to be admitted, these admissions are reduced into writing and signed by the attorneys on both sides, and being read, they supply the place of actual proof.

The necessity of
mutual admissions.

In every litigation upon commercial subjects, and particularly in matters of insurance, it is highly proper, nay in some cases absolutely necessary, that the parties should mutually admit every fact that is not meant to be seriously disputed, in order that the case may be put upon its true merits with as little expence, vexation, or delay as possible. Commercial liberality and professional honour both equally require that this species of candour should be carried as far as the fair and just pretensions of the parties will admit. Nothing can more conduce to the ends of justice, nothing can more exalt the national character, or promote the true interests of commerce, than such mutual concessions.

The rules of evidence are, in general, the same in trials upon policies of insurance as in other cases. There are only two cases to be found in our books upon points of evidence which may be thought peculiar to insurance.

(a) *R. Camden v. Edie*, 1 H. Bl. 21.

The first is a very short note, in which it is said to have been determined that, in an action on a policy of insurance, any who have insured upon the same ship cannot be witnesses.—Mr. Justice *Buller*, from whose book the above note is cited, in delivering his judgment in the following case of *Bent v. Baker*, says, that he took great pains, but without success, to get the real statement of that case, thinking that it might have been determined on its own particular circumstances. “However,” says he, “in consequence of that determination, judges at *nisi prius* have frequently rejected underwriters as witnesses. Nor is it extraordinary that at *nisi prius* they should have been guided by the only case upon the subject, without much examination into the grounds of it.”

In general an underwriter cannot be a witness in an action on a policy.

Ridout v. Johnson, E. 11 An.
Bul. N. P. 283.

In the other case, which was solemnly determined upon great consideration, one *Bowden*, the broker who had effected the policy, was produced as a witness on behalf of the defendant. It appeared that *Bowden* had subscribed the same policy, immediately after the other underwriters; that an action was then depending against him for the same loss; and that he and the other underwriters had filed a bill in equity against the insured for a discovery, in order to avoid the policy.—It was objected on the part of the plaintiffs, that he was not a competent witness for the defendant. Upon this the defendant produced a release to *Bowden* of all demands for any contribution of costs both in law and equity, and the costs of the suit in equity were tendered to the plaintiffs, with an undertaking to dismiss their bill, which the plaintiffs refused.—The witness was rejected by Lord *Loughborough*, and this question coming before the court of King’s Bench upon a bill of exceptions, it was there determined that, under the circumstances, *Bowden* was a competent witness for the defendant, and that his testimony ought to have been received.—Lord *Kenyon* founded his opinion on the ground that the witness was not interested.—Mr. Justice *Asbursft* thought that, as he had acted as broker, he could not afterwards, by subscribing the policy, or by any other act of his own, deprive

But if the broker who effects a policy, subscribe it himself, after the other underwriters have subscribed it;—he may be a witness for the other underwriters, if they release him from all contribution for costs, though an action be depending against him, and he has joined in a bill in equity against the insured, for a discovery.

Bent v. Baker,
3 T. R. 27.

prive either party of his testimony.—Mr. Justice *Buller* was of opinion, that if the witness was competent to answer *any* question, he ought not to have been rejected *generally*; and that, on the principle of necessity alone, he ought to have been received; as he might be the only person who, from the nature of the thing, could speak to a representation, for instance, made by himself to the underwriters.

This case affords a sufficient proof, that brokers and others, who act as agents, either for the insured or the insurers, ought never to be underwriters (*a*).

The evidence generally adduced on the part of the plaintiff is reducible to the following heads;

1. Proof of the contract;
2. ——— payment of the premium;
3. ——— the interest of the insured;
4. ——— the performance of warranties;
5. ——— the loss.

1. Proof of the Contract.

The policy being proved, is conclusive evidence of the contract; and no parol evidence can be received to vary the terms of it.

The first step on the part of the plaintiff is to prove the contract, which is done by producing the policy and proving the defendant's subscription to it. This, if there be no variance, is conclusive evidence of the contract stated in the declaration; and no evidence can be received of any parol stipulation or agreement to alter, control, or qualify it.

A parol agreement that the risk was to begin at a place different from that inserted in the policy, cannot be received in evidence.

Thus, where an insurance was made "From *Archangel* " to *Leghorn*;" and at a trial at bar, the defendant endeavoured to set up a parol agreement, made before the subscription, that the adventure should only begin from the *Downs* :—It was objected, that unless such agreement be put in writing, it shall be taken that the policy speaks

Kaine v. Knightly, *Skin.* 454.

(*a*) *Vid. sup.* 209.

the

the minds of the parties; and to suffer policies to be defeated by agreements not in writing, would be to lessen their credit, and render them of no value.—Lord C. J. *Pemberton* said, that policies were sacred things; and that a merchant should no more be allowed to go from what he had subscribed in them, than he that subscribes a bill of exchange, payable at such a day, shall be allowed to say that it was agreed to be upon a condition, &c. when the bill may have been negotiated: For though neither of them is a specialty, yet they are of great credit, and much for the support, convenience, and advantage of trade.—The jury, however, found contrary to the direction of the court. But this verdict was set aside; and upon another trial at bar, the next term, there was a verdict for the plaintiff, according to the direction of the court:

Witnesses may be examined, however, to prove an *usage*, as explanatory of a clause in a policy; but their *opinion of its meaning* is not admissible evidence (a). Questions of construction are questions of law, which the judges only are competent to determine; and the opinion of no other person, whatever may be his ability or experience, can ever be looked upon as of authority in our courts, or received in evidence before a jury.

With respect to *usage*, it is a sort of natural law, formed out of our habits, our interests, and the universal consent of mankind. In all maritime affairs, it is regarded as the surest interpreter of the law. There the maxim, *Optima est legum interpret consuetudo*, particularly applies. In questions of insurance, established usages must in all cases be adhered to; and in doubtful cases, they are the safest guide we can follow. If the usage of trade in any instance be not sufficiently known or rightly understood, it is advisable to consult the most experienced merchants.—Still, however, the power of usage is not to destroy the law. Usage is to

Witnesses may prove an *usage* as explanatory of a clause in the policy; but their *opinions* are not admissible. How far the usage of trade to be attended to.

How far the usage of trade ought to be regarded.

(a) Per Lord Mansfield, in *Lyons v. Bridge*, Doug. 512. Vid. also Lord Mansfield's judgment in *Carter v. Boehm*, sup. 347.

be consulted only where the law is doubtful. Where the law is clear, it must prevail. The law is permanent; but usages sometimes change, and often disappear with the circumstances which gave them birth.

How the procuration shall be proved where a policy is subscribed by an agent in the name of his principal.

Policies are often subscribed by an agent in the name of the underwriter, and in strictness, the procuration or authority of the agent, thus to subscribe for his principal, ought to be proved. Few defendants, however, would ever think of availing themselves of the want of such proof in an action which ought never to be tried but upon some point fairly disputable. An instance, however, occurs where the attempt was made.

Neale v. Erving,
Esp. Rep. 61.

In an action on a policy, the broker was called to prove the subscription. He said that the defendant's name had been subscribed by one *Hutchins*; he did not know by what authority, but that *Hutchins* was in the constant habit of subscribing policies in the defendant's name, and had done several for him and for others to his knowledge.—It was objected that *Hutchins* might have done this by a power of attorney, which might have been limited, or for a particular purpose; and therefore should have been shewn, that it might appear that *Hutchins* was properly authorised.—But Lord *Kenyon* overruled the objection, being of opinion that the acts of *Hutchins* held him out to the world as properly authorised; and his having subscribed several policies in the defendant's name, was sufficient evidence of that authority to charge the defendant: That if *Hutchins* was only a particular agent for the defendant, it lay on him to shew it, not the plaintiff.

2. Proof of Payment of the Premium.

Proof of the policy is proof of the payment of the premium.

Every policy contains a clause by which the underwriters confess themselves to have been paid by the insured the consideration for the insurance, after the rate of

of so much *per cent.*; and the policy being proved, is therefore evidence of the premium's having been paid.

Policies are, in general, effected by the intervention of brokers, between whom and the underwriters open accounts are usually kept, in which the brokers make themselves debtors for all premiums, and take credit for all losses which they are authorized to receive from the underwriters; and these accounts are settled and adjusted at stated periods. In general, therefore, the underwriter looks to the broker only for his premium. It often, indeed, happens that the underwriter knows not who the insured is; and as he gives the insured a receipt for the premium upon the face of the policy, it must be supposed that, having thus discharged him, if the premium be left unpaid, he gives credit only to the broker, and from him only can he recover it (y).

3. *Proof of the Interest of the Insured.*

The next thing to be proved is the *interest* of the insured (z). This may be done by any documents which are evidence of the property which the insured has in the ship or goods insured, and of the value of that property; such as bills of sale, bills of lading, invoices, and proof that the goods were on board (c), bills of charges of the out-fit, custom-house clearances, &c.; and any deficiency in this species of proof may be supplied by parol evidence. So, if the insured has exercised acts of ownership, by directing the loading, &c. of the ship, it has been holden that proof of the payment of the people employed, was sufficient proof of interest in the ship (d).

How the interest may be proved.

The rules of evidence in such cases, where no fraud is suspected, are not very rigidly adhered to:—Therefore

(d) Vid. sup. 203.—(b) As to what shall amount to an insurable interest, vid. sup. ch. 1, post.—(c) Per Lord Kenyon, in *Ad. Andrew v. Bell*, at N. P. Rep. N. P. Rep. 373. sup. 350.—(d) Per Lord Kenyon, at N. P. *Amery v. Rogers*, 2 Esp. N. P. Rep. 269, sup. 531.

A bill of parcels with the vendor's receipt for goods bought abroad is sufficient proof of interest.

Ruffel v. Bochm,
2 Str. 1127.

Upon a general averment of interest the insured may prove any species of interest that is deemed insurable, in any aliquot part of the thing insured.

Upon a valued policy, it is only necessary to prove some interest.

Yet the value in the policy is only *prima facie* evidence, and may be disputed.

where an action was brought upon a policy of insurance on a cargo of goods purchased at *Petersburgh*; the plaintiff, in order to prove his interest, produced a *bill of parcels* from the vendor at *Petersburgh*, with his receipt to it, and proved his hand-writing. The defendant objected that this was no evidence against the underwriters: But Lord C. J. *Lee*, who tried the cause, held it to be sufficient evidence of the plaintiff's interest.

In the second section of this chapter (a) it has been shewn that in the declaration the interest may be averred either generally or specially; and that, under a general averment of interest, the insured may prove any species of interest he may have in the ship or goods insured. It is also there shewn that it is unnecessary to state the *quantum* of the interest in the declaration; for as the plaintiff in assumpsit recovers according to the evidence *pro tanto*, he may under a general averment of interest in the entire thing insured, prove an interest in any *aliquot part*, and recover damages for the loss in proportion to such part.

If the policy be an *open* one, the real value of the plaintiff's interest must be proved: If it be a *valued* one, it has been holden that the insured needs only to prove *some* interest, to take the case out of the stat. 19 G. II. c. 37; because the underwriter, by subscribing the policy, has admitted the value there stated; and if more were required, the agreed valuation would signify nothing (b). And yet the value in the policy is only to be taken as *prima facie* evidence of the amount of the interest of the insured. For though this value is admitted by the insurer; yet, as he admits it upon the mere representation of the insured, if he find it to be fallacious, and that the specified value was fictitious, and only a cover for a wager, it cannot be supposed that he is so far concluded by his admission, as not to be at liberty to dispute the value, and shew by evidence, that it was meant as a mere evasion of the act (c).

(a) Sup. 589.—(b) Per Lord Mansfield, in *Lewis v. Rueler*, 2 Bur. 1171, sup. 535.—(c) Vid. Sup. 199.

In an action upon a policy on goods, the plaintiff cannot give in evidence a *respondentia bond*, as proof of interest in the goods upon which the money was borrowed, though they were of greater value than the sum insured; because bottomry and respondentia interests are always insured *as such*, and there is no instance of an insurance on respondentia under the denomination of goods (a).—Where money has been lent on respondentia on *East India* voyages, the stat. 19 G. II, c. 37, § 5, considers the borrower as having a right to insure only for the surplus value of the goods, above the money borrowed; and the lender as having a right to insure for the sum lent. If either were to insure for more, it would be a *wager* (b).

But the usage of a particular trade may sanction a departure from this rule.—As where the captain of an *East Indiaman* made an insurance on “*goods, specie and effects*” on board; he was permitted, in an action on his policy, to give in evidence of his interest, money which he had laid out in the course of the voyage, and for which he charged respondentia interest (c).

It would seem, however, that, upon a policy on goods generally, the insured may be permitted to give in evidence of his interest, a mortgage or other special *lien* (d).

In an action upon a policy on bottomry or respondentia securities, evidence of the execution of the bottomry or respondentia bond, and of the interest of the obligor in the ship or goods, is sufficient proof of interest in the insured; and in such case, the obligor himself is a competent witness to prove his own interest in the ship or goods on which he borrowed the money (e).

Upon a policy on goods, the plaintiff cannot give a respondentia bond in evidence in proof of interest,

In *East India* voyages the lender on bottomry or respondentia can only insure the sum lent, and the borrower, the surplus value.

But the usage of trade may sanction a departure from this rule.

An interest in goods may be proved by a mortgage or other special *lien*.

Evidence of the execution of a bottomry or respondentia bond, and of the interest of the obligor, is sufficient proof of interest in the obligee; and the obligor himself may prove his own interest.

(a) *R. Glover v. Black*, 3 Bur. 1394, 1 Bl. 399, 405, 422. sup. 223.—(b) Per Lord Mansfield, 1. c. 3 Bur. 1400.—(c) Vid. *Gregory v. Christie*, sup. 94.—(d) Sembl. *Glover v. Black*, 1 Bl. 423. sup. 225.—(e) Vid. 1 Bl. 396.

4. *Proof of Compliance with Warranties.*

The truth of
affirmatives, and
the performance
of executives,
warranties, must
be strictly and
literally proved.

Every material agreement in the declaration must be proved. One of the most material agreements is that of the truth of such affirmative warranties, and the performance of such executory ones, as are contained in the policy; such as that the ship, or goods insured were neutral property; that the ship sailed within the time limited by the policy; that she departed with convoy; that she was of the force warranted; that she was manned with the stipulated complement of men, &c. — This agreement of compliance with the express warranties, contained in the policy, must be strictly and literally proved; for these warranties, being in nature of conditions precedent, the compliance with them is an essential part of the plaintiff's title; and a non-compliance with any warranty contained in the policy, to whatever cause this may be imputable, deprives the insured of all claim to the indemnity meant to be secured to him by the contract.

Proof of neutral property.

In the case of a warranty that the thing insured is *neutral property*, it is usual at the trial to give general evidence of the truth of that warranty; and leave it to the defendant to falsify it, or prove a breach or forfeiture of it. The evidence adduced by the defendant, for this purpose, is usually a sentence of condemnation as prize by one of the belligerent powers, either on the ground of the thing insured having originally been enemy's property, or because the ship, by some misconduct, had forfeited her neutrality. Copies of the sentence and of the other proceedings in the court of admiralty, properly authenticated, are always deemed sufficient evidence of the fact of condemnation, and of the grounds upon which it proceeded (a).

(a) Vid. sup. ch. 8. § 4, n. 3, where it has been very fully shown, in what cases the sentence of a foreign court of admiralty shall have relation in our courts, and be deemed conclusive evidence to falsify this warranty. Consult also the other sections of the chapter on warranties.

5. *Proof of the Loss.*

The accident or misfortune which was the cause of the loss must, as we have already seen (a), be distinctly and explicitly set forth in the declaration, in order that the insurer may have notice of the case against which he is to prepare his defence.

The true cause of the loss must be set forth in the declaration.

To charge the insurer, the loss must appear to have happened during the continuance of the risk; and cases have frequently occurred in which this was the principal question. What shall be the commencement and duration of the risk has been already fully treated (b); and little need be added here upon this subject. Suffice it to say, that in the case of a *ship*, if she be insured from a place, it will be sufficient to prove that she weighed anchor, or broke ground, in order to sail on the voyage insured. If the insurance be *at and from* a place, the risk commences from the time of subscribing the policy, if the ship be at home; or from the first moment of her arrival at the place specified, if that be in a distant part of the world.—If the risk on the ship be from the loading the goods on board, then proof that any part of the cargo has been shipped, will be evidence of the commencement of the risk.

The loss must be proved to have happened during the continuance of the risk.

In the case of a *ship*.

If the insurance be on goods, the underwriter may, if he think proper, call on the insured to prove that they were put in risk. This may be done by the testimony either of the persons who shipped them, or of those who received them on board the ship mentioned in the policy. But the best evidence of this is the bill of lading, which, if *bond fide* made, is in all countries considered as an authentic document, and conclusive evidence of the quantity and species of goods laden on board; because the captain, who must exhibit it on his arrival at the port of destination, is interested that it shall not include more than he has on board to deliver.—It is, as *Valin* justly observes, the true and specific proof of the loading, and

In the case of *goods*.

(a) Sup. 591.—(b) Sup. 161.

not only evidence, as between the captain and the merchant, but also against insurers and all others (a).—The underwriter may, however, impeach the bill of lading on the ground of fraud or collusion. But the insured cannot alledge any thing in contradiction to it.

The loss may be proved by the parol testimony of the master, officers, and crew of the ship, or by any other legal evidence that can be adduced for that purpose.

A protest is not evidence, while the person who made it is living.

But the following case will shew that the protest of the captain, so long as he is living, is in no case evidence on the one side or the other; the only use that can be made of it is to contradict his testimony, if he varies from it.

The broker's showing it to an underwriter, with other papers relating to the loss, on demanding payment, will not make it evidence against the insured.

An insurance broker applied to an underwriter for payment of a loss, producing the different papers relating to the subject, and, among the rest, the protest signed by the captain. The underwriter told him he had looked into the papers, and as there was a point in the case, he would not pay the loss.—In an action on the policy, it was contended on the part of the defendant, that the protest was made evidence by the plaintiff, as a paper delivered by his agent to the defendant, containing an account of the loss on which he rested his claim; and therefore, that it amounted to a declaration made by the plaintiff to the defendant of the facts on which he required payment.—Lord *Kenyon*, who tried the cause, being clearly of opinion that the protest was not admissible evidence, the plaintiff obtained a verdict.—On a motion for a new trial, the court were clearly of opinion that the protest, of itself, could not be evidence; and its having been in the broker's hands, and shewn by him to the defendant, on an application for payment, would no more render it evidence, than a bill in equity could be made evidence against the plaintiff, because its contents must have been shewn to the defendant.

If a loss by capture be alledged, the plaintiff cannot prove a loss by perils of the sea.

The loss must appear to have arisen from the very cause alledged in the declaration, and no other. If, therefore, a

(a) *Valin*, t. 1, p. 604. Vid. *Polhier*, h. t. n. 144. *Emerig.* t. 1, p. 314.

loss be alledged in the declaration to have been occasioned by *capture*, the plaintiff cannot, under such an averment, prove a loss by *perils of the sea*, or by any other cause than capture (a).

So, if there be two counts in the declaration, one for a loss by *detention of people*, the other for a loss by *pirates*; the plaintiff cannot, on either of these counts, give in evidence that a mob of rioters had boarded the ship, in order to compel the captain to sell a cargo of corn at an inferior price; and that in consequence of this boarding, the ship was stranded and a quantity of corn lost. This could only be given in evidence upon a loss by *stranding* (b).

Though it is a maxim in law that fraud shall never be presumed, but must be strictly proved; and it is a rule, founded on that maxim, that in questions of insurance, he who charges barratry, must substantiate it by conclusive evidence (c); yet it has been determined that proof of the captain's having carried the ship out of the regular course of the voyage, for fraudulent purposes of his own, is, *prima facie*, sufficient to entitle the plaintiff to recover as for a loss by barratry; without shewing negatively, that he was not the owner, or that this was not done with the owner's consent (d).

No evidence can be given of any loss unless it be the immediate consequence of some peril insured against. That which is only a remote consequence of such peril is not within the policy. If this rule were not adhered to, it would be impossible to draw the line, and the inquiry into the remote consequences of an accident or misfortune would be infinite.

Thus, where an insurance was made on a ship in the slave trade, "At and from *Bristol* to the coast of *Africa*, "during her stay and trade there, and from thence to her "port or ports of discharge in the *West Indies*." There

If a mob board a ship and run her on shore, whereby goods are lost; this is a loss by stranding, and not by *detention of people*, or by *pirates*.

Proof that the captain was guilty of barratry, is sufficient; without shewing, negatively, that he was not owner, &c.

No loss is within the policy, which is not an immediate consequence of some of the perils insured against.

In a policy on slaves, there is an insurance against mortality by *mutiny*, and in a mutiny some are killed, others die of their wounds received in the mutiny, others of chagrin, others by swallowing salt-water, others jump overboard:

(a) Vid. *Kulen Kemp v. Vigne*, 1 T. R. 304, sup. 106.—
(b) *R. Nesbit v. Lushington*, 1 T. R. 783, sup. 436.—(c) *Barataria crimen nunquam est presumendum, sed concludentissime probandum. Casaregis*, disc. 1, n. 60; disc. 225, n. 99. Vid. *Emerig.* tom. 1, p. 372.—(d) *R. Ross v. Hunter*, 4 T. R. 33, sup. 457.

The insurer is liable for those who were killed or mortally wounded, in the mutiny; but not for those who died from other causes, though the remote consequences of the mutiny. Neither is he answerable for the diminution in value occasioned by the disposition manifested by the mutiny.

Jones v. Schmall,
2 N. P. Trin.
Vac. 1785,
1 T. R. 130, n.

was a memorandum on the policy, in these words;—
“The insurers are not to pay any loss that may happen in boats during the voyage, (mortality of negroes by natural death excepted), and not to pay for mortality by mutiny, unless the same amount to 10 l. per cent. to be computed upon the first cost of the ship, out-fit, and cargo, valuing negroes so lost at 25 l. per head.”—In an action upon this policy, the demand was for the value of a number of slaves lost by mutiny.—The evidence of the captain was that he had shipped 225 prime slaves on board: That on the 23d of May, before he sailed from the coast of Africa, an insurrection was attempted: That the women seized him on the quarter-deck, and attempted to throw him overboard; but he was rescued by the crew: That the women, and some men, threw themselves down the hatchway, and were much bruised; and 12 men and a woman died of their bruises, and from abstinence: That on the 23d of May, there was a general insurrection, and the crew were from imminent necessity, obliged to fire upon the slaves, and attack them with weapons: That several slaves took to the ship's sides, and hung down in the water, by the chains and ropes; some for about a quarter of an hour: That several were killed by firing, several wounded, several died from swallowing salt water, or of their wounds, or from bruises; some from chagrin at their disappointment; some from abstinence; some from fluxes and fevers; in all to the amount of 55, who died during the voyage.—The underwriters had paid for 19, who were either killed during the mutiny, or died of their wounds which amounted to 15 per cent. For the plaintiff it was contended that, though the rest did not actually die in the mutiny, or of any wounds received at that time; yet, as they had all died in consequence of the mutiny, the underwriters were liable. Another consequential loss was, that the circumstance of the mutiny had so lessened the value of the slaves, in the estimation of the planters, that they were sold for 17 l. a head less than they would otherwise have fetched.—Lord Mansfield, who tried the cause, said;—“I think the underwriters not answerable for the loss of the market, or the price

price of it: That is a remote consequence, and not within any peril insured against by the policy. The question for the jury will be, whether any of those, who died by any other means, except the being fired upon, or in consequence of the wounds and bruises which they received during the struggle, are within the meaning of the policy, which insures against damage by mutiny. It is very clear that those who were killed by the firing, or died in consequence of their bruises during the mutiny, are within the policy; the other complicated case must be left to the jury. I think, clearly, those not within the policy, who, being baffled in their attempts, in despair, chose a mode of death, by fasting, or died through despondency. That is not a mortality by mutiny, but the reverse; for it is by the failure of a mutiny.—The great class are such as received some hurt by the mutiny, but not mortal, and died afterwards from other causes; as those who swallowed salt-water, jumped over-board, &c.—This is the great point.—The jury found,—that all who were killed, or died of their wounds or bruises, which they received in the mutiny, though accompanied with other causes, were to be paid for: But, that all who had died by swallowing salt water, or leaping into the sea, or hanging upon the sides of the ship, without being otherwise bruised, or died of chagrin, were not to be paid for.

So, where the ship *Fly* was insured from *Lyons* to *London*, against capture only; and the ship on her voyage was driven by a gale of wind on the coast of *France*, and there captured by the enemy.—In an action on the policy it was contended on the part of the defendant, that this was a loss by the perils of the sea, and not by capture. But Lord *Kenyon*, who tried the cause, held that this was clearly a loss by capture; for had the ship been driven on any other coast than that of an enemy, she would have been in perfect safety. The jury, under this direction, found a verdict for the plaintiff.

But the plaintiff may give in evidence any loss or damage which is an immediate consequence of the accident or injury alleged in the declaration.—As where it was averred in the declaration, that the ship sprung a leak and sunk in the river, whereby the goods were spoiled;

A ship is driven by stress of weather on an enemy's coast, and there captured. This is a loss by capture, not by the perils of the sea.

Green v. Bristle, 25 B. R. 242.

That the plaintiff may give in evidence any loss immediately proceeding from the cause &c.

ledged in the declaration; as payment of salvage when the loss is averred to have happened by the sinking of the ship.

Carey v. King,
Ca. temp. Hard.
304.

The loss must be a direct and immediate consequence of the cause alleged.

Wages and provisions expended during a repair of sea-damage, is not a loss within a policy on the ship.

Fletcher v. Poole,
at N. P. sit r
East. 1769, Park
52.

Upon a policy on ship and goods, the insured can-

spoiled: And the evidence was, that many of the goods were spoiled, but some were saved. The question was, whether the plaintiff might give in evidence the *expense of salvage*, though not particularly stated in the declaration, as a breach of the policy.—Lord *Hardwicke* said,—"I think they may give it in evidence; for the insurance is against all accidents. The accident laid in the declaration is, that the ship sunk in the river: It goes on and says, that by reason thereof the goods were spoiled. This is the only special damage laid: Yet it is but the common case in a declaration that lays special damage, where the plaintiff may give in evidence any damage that is within his cause of action as laid. It was objected that such a breach of the policy should be laid that the insurer may have notice to defend it. Now it is so in this case, for they have laid the accident, which is sufficient notice, because some damage must have happened."

The loss must appear not only to have proceeded from the very cause alleged in the declaration, but also to be a direct and immediate consequence of the accident or misfortune which has happened to *the very thing insured*. Therefore an expense which is incurred in consequence of the accident or misfortune stated in the declaration, but which is not incurred in repairing the damage occasioned by it, cannot be given in evidence as part of the loss within the meaning of the policy.

Thus, where a ship was insured, "At and from *London* to *Newcastle* and *Marseilles*, and from thence to the *West-Indies*."—The ship, in distress, bore away for *Minorca*, where it being found necessary to repair her, she was unavoidably detained there a considerable time.—The insured brought an action on the policy, to recover the extraordinary *wages and provisions* expended during this detention.—But Lord *Mansfield*, who tried the cause, was of opinion that such a demand could never be allowed as a charge against the insurer on *the ship*; and a verdict was accordingly given for the defendant.

So where an insurance was made "on *ship and goods*, from *Ostend* to *Dominique*,"—The ship in her voyage having

having met with bad weather, and being in great distress, the crew threatened to take the command from the master, unless he would make for the first port. The master bore away for *Ferol* to repair the ship; but by the time the repairs were finished, the crew deserted her. He then got another crew, and at the moment he was going to sail, the *Spanish* governor stopped him, and after detaining him 37 days, discharged him, and he proceeded on his voyage, and at length arrived at *Dominique*.—An action was brought on the policy to recover the loss incurred by *wages, provisions, and demurrage*, during the ship's detention at *Ferol*.—On the part of the underwriters it was contended that the freight, and not the ship, is liable for this loss, and that the charge of demurrage could not be allowed upon this policy.—Mr. Justice *Buller*, who tried the cause, was of this opinion, and nonsuited the plaintiff.

not recover for wages, provisions or demurrage, during a ship's stay to repair, and detention by a foreign power.

Eden v. Poole, at N. P. after Hil. 1785, *Park* 54.

So, where a ship was insured, "At and from *London* "to *Africa*, during her stay and trade there, and to her "port of discharge in the *West Indies*."—The ship on her voyage from *Africa* with a cargo of slaves to her port of discharge in the *West Indies*, touched at *Barbadoes* for the purpose of watering, where she was detained a considerable time by an embargo, which had been before laid by the commander in chief on all ships at that island. The captain applied for leave to depart, and being refused, he sailed without leave, but was pursued by a sloop of war, and after a slight engagement, brought back, and the crew distributed among the men of war. The embargo continued from the 18th of *December*, till the 27th of *January*. The small pox broke out among the slaves on the 22d of *January*. In consequence of all this, and for want of mariners to navigate the ship, she was detained at *Barbadoes* above two months after the embargo was taken off. She then sailed to *Jamaica*, her place of discharge.—An action was brought on the policy to recover the amount of the additional *wages and provisions* occasioned by the ship's detention under the embargo. Mr. Justice *Buller*, who tried the cause, was of opinion that this policy, being upon the body of the ship, and the average loss thereon, exclusive of the charge for wages

The insured upon a policy on the ship, cannot recover the expense of wages or provisions occasioned by a detention under an embargo.

Robertson v. Ewer, 1 T. R. 127.

and

and provisions, being less than 3 per cent., the plaintiff was nonsuited.—Upon a motion to set aside this nonsuit, it was contended on the part of the plaintiff, *first*, that this loss, being occasioned by the embargo for which the insured might have abandoned, and recovered as for a total loss, he might recover a partial loss to the amount of the damage actually sustained (a); and *secondly*, that this was a loss occasioned by the barratry of the master, by his resistance to lawful authority.—But the court determined that the plaintiff had no right to recover on either ground.—Lord Mansfield said,—“There is no authority to shew that, on this policy, the insured can recover for such a loss; but it is contrary to the constant practice. On a policy on a *ship*, sailor’s wages, or provisions, are never allowed in settling the damages. The insurance is on the body of the ship, tackle, and, furniture; not on the voyage or crew. Here it is admitted that no damage was done to the ship, tackle, or furniture; and therefore I think the direction was right, and that the plaintiff ought not to recover.”—Mr. Justice Buller said,—“If the ship had been detained in consequence of an injury which she had received in a storm, though the underwriters must have made good the damage; yet the insured could not have claimed the amount of wages or provisions, during the time spent in repairing. The court only look to the *subject-matter of the insurance*. Here the ship was safe; and the wages and provisions are no part of the thing insured.”

Yet a ship’s provisions are considered as *part of the ship*, and are protected by the policy.

Yet, in the following case, which is not easily reconcilable with the three foregoing cases, it was the opinion of the court that a ship’s provisions are protected by the policy, even when landed on a *Bank-Saul* during a repair: and that they were to be considered as a *part of the ship*.

A ship’s provisions, during a repair, are landed on a *Bank-Saul*, and there consumed by her. The underwriters on the ship

An insurance was made on a *China* ship; and, in the usual words, “On the tackle, ordnance, ammunition, artillery, and *furniture* of the ship.”—In an action on this policy, it appeared that while the ship was lying off *Bank-Saul Island*, in the river *Canton*, it became necessary

(a) *Wid. Roich v. Edie*, 6 T. R. 425. Feb. 439.

to refit her, for which purpose, the stores and provisions were taken out of her, and put into a warehouse called a *Bank-Saul*, where they were destroyed by accidental fire.—At the trial, this accident was considered as if it had happened *on board the ship (a)*, and it was admitted that the policy covered all the articles but the *provisions*, and if they were not protected by the policy, then there would not be a partial loss of $\frac{1}{2}$ per cent.—On the part of the defendant it was contended that the provisions, which were merely for the ship's crew, were not protected by a policy on the *ship*. But one of the jury, observing that it had been determined in Lord Mansfield's time, that they were included under the word "*furniture*," and that the merchants in the city had ever since acquiesced in this decision, there was a verdict for the plaintiff.—On a motion for a new trial, the above case of *Robertson v. Ever* was relied on as a clear authority, to shew that the ship's provisions were not protected by a policy on the ship; and that, if provisions were included in the term "*furniture*," there could never be a total loss, after a consumption of any part of them.—The court, however, were unanimously of opinion that the underwriters were liable for the expence of the provisions which were bought to replace those consumed by the fire, which was an accident within the words of the policy.—Lord Kenyon said;—"When it was stated, at the trial, that *provisions* were included in the word '*furniture*,' I confess I was somewhat at a loss to know to what extent the underwriters were liable on words so indefinite as these which are used. If the provisions be insured as part of the out-fit of the ship, and they were destroyed by one of the perils insured against, there is an end of the question; a loss has happened within the meaning of the policy, and consequently the defendant is liable. But it was said in the argument, that the instant any of the provisions were consumed on board, there could not be a total loss: But the answer is, that that comes within the *wear and tear of the ship*; and it might

and furniture are liable.

Brough v. Whitmore, 4 T. R. 266.

(a) Vid. *Palley v. Roy. Ex. Ass. & Bar.* 341., sup. 181.

The distinctions
made between
this case and
that of *Robertson*
v. Ewer.

as well be said, that if a mast were a little injured, there could not be a total loss. The case of *Robertson v. Ewer* is clearly distinguishable from the present. Here the provisions were consumed by an accidental fire on board the ship, (for the island and the ship were, for this purpose, the same), and within the meaning of the policy; but, in that case, they were consumed by the negroes, during the detention of the ship (a).”—Mr. Justice Buller said, —“It is perfectly clear that, in every instance where losses have been settled, the provisions put on board the vessel, when she sailed, have been considered as part of the ship. The value of the ship alone comprehends the hull, the masts, the tackle, and the provisions. Then, if the provisions be included in a policy on the ship, and all the provisions be lost, the underwriters must make good the whole loss, whether it be a valued or an open policy. But it has been said, that if an accident happen after some of the provisions are consumed, the underwriters are entitled to a deduction to the amount of such provisions: I will answer this, as the argument applies, first, to a valued, and then, to an open policy. As to the first; from the nature of the policy, the provisions are not insured against all events; they are only insured against particular risks. Again, there is nothing from

(a) According to the report of *Robertson v. Ewer*, Lord Mansfield laid it down as a general rule, not restricted to any particular trade, that on a policy on a ship, sailor's wages or provisions are never allowed in settling the damages; nor was it ever objected in that case, that the provisions had been consumed by the slaves. Indeed, it is not likely that such an objection could have been made; for it is well known, that the food provided for the slaves is part of the cargo, and very different from that which is provided for the ship's company; besides, the ship's company must have consumed a part. But, be this as it may, if it be necessary, in order to support the case of *Robertson v. Ewer*, to suppose that the provisions, for which the insured wanted to charge the underwriters, were consumed by the slaves, and not by the crew, then the cases of *Fletcher v. Poole*, and *Eden v. Poole*, where no such ground could be alledged, cannot be sustained.

which

which there can be salvage: If the body of the ship, and every thing on board, be sunk, or burned, there can be no salvage. And, in the case of an open policy, the insured must prove, by evidence, what was the value of the whole; and then the same reasons apply as in the case of a valued policy. With respect to the case of *Robertson v. Ewer*, I thought at first that it applied strongly to the present; and if I still entertained the same opinion, I would not, on account of any usage to the contrary among underwriters, overturn a solemn determination of this court: But that case, and the two others there mentioned, are clearly distinguishable from the present. In all those cases the insured wished to charge the underwriters with the amount of the provisions consumed, during the time when the ships were detained. Of those, therefore, it is sufficient to say, that an insurance is on the ship *for the voyage*; but during a detention, the ship is not proceeding; and therefore the underwriters are not liable (a). This case also differs from *Robertson v. Ewer* in another circumstance: There, the provisions were consumed by the slaves on board, and not by the ship's crew, and the slaves are considered as a part of the cargo. The words of Lord *Mansfield*, in that case, must be taken with reference to the case then before him. He was then speaking of a charge for provisions and during the detention of the ship, and for the maintenance of the slaves; and he said;—"There is no authority to shew that, on *this policy*, the insured can recover for *such a loss*; but *" it is contrary to the constant practice."* Then he proceeded to say that, on a policy on a ship, sailor's wages or provisions are never allowed in settling the damages. Now, even if those latter words be taken in their general sense, and not confined to the case immediately before the court, they are accurate; for provisions *eo nomine*, are not taken into consideration.—If the captain be obliged,

(a) There must be some mistake of the reporter in this place. It cannot be supposed that the learned judge ever meant to say, that while a ship is detained, she is not under the protection of the policy.

in consequence of the detention, to purchase other stores for the remainder of the voyage, the underwriters are not answerable for these; but only for those which were on board at the time of the insurance, since they only formed a part of the value of the ship.—The usage of merchants, as to the construction of these instruments, stands unimpeached, and therefore it must prevail in this case.”

When the expence of wages and provisions shall be a general, when a particular, average.

By the law of *France* (a), the expence of wages, and provisions of the seamen during a detention, are reputed a *gross*, or *general average*, if the ship was hired *by the month*; but if hired *for the voyage*, this expence is borne by the ship alone, as a simple average.—*Pothier* (b) gives the following reason for this distinction. The wages of the sailors being included in the freight, when the ship is chartered *for the voyage*, the owner, who receives freight for the whole voyage, is bound to supply the labour of the sailors for the whole time of the voyage, of which the time of the detention makes a part.—On the other hand, when the ship is chartered *by the month*, the owner, receiving no freight during the detention, owes no service of the sailors to the affreighter. The affreighter, therefore, ought, in consideration of the benefit he derives from the labour of the sailors, to pay for their labour and provisions during the detention.

But the usage of trade often determines what shall be deemed part of the ship.

But the usage of trade often controls the general construction of the policy; and what shall or shall not be protected as part of the ship and furniture depends, in some cases, on the usage of a particular trade.

Whether the fishing tackle in the *Greenland* whale fishery be included in a policy on the ship, depends on the usage of the trade.

As where an insurance was made, in the usual form, on a ship employed in the *Greenland* fishery; and, in an action on the policy, the question was, whether the *fishing-tackle* was included in the insurance on the *ship, furniture, &c.*—Lord *Mansfield*, who tried the cause, said that there was no doubt but that the boats, and rigging, and stores, belonging to the ship were included; and as to the fishing stores, it must depend on the *usage of the*

Hopkins v. Pickersill, E. 23 C. III, B. R. MS.

(a) Ord. de la mar. tit. des avaries, art 7. Vid. Emerig. tom. 1, p. 539.—(b) Tit. des chartes parties, n. 85.

trade. On this, there was contradictory evidence. The plaintiff, however, obtained a verdict, which the court afterwards set aside, and granted a new trial, upon the ground that the evidence of the usage was principally in favour of the defendant.

In a former chapter we had occasion to observe that the *captain's clothes*, the *ship's provisions*, and *goods lashed to the deck*, are not comprehended under the general denomination of "*goods, wares, and merchandizes*," in the policy; and that the insurer is not, therefore, liable for any loss on these articles unless they be specifically named (*a*).

Therefore, where an action was brought on a policy on *goods*, the property of the captain, for six months, the loss proved was chiefly for *goods lashed to the deck*, the *captain's clothes*, and the *ship's provisions*.—On the part of the defendant it was proved by an underwriter and a broker, that none of these things are within a general policy on *goods*; because the risk is greater, as to goods lashed on deck, than on other goods; and that a policy on goods generally, means only such goods as are merchantable, and a part of the cargo. They also swore that when goods like the present are meant to be insured, they are always insured by name, and the premium is greater.—Lord *Mansfield* said he thought it consistent with reason, and understood the usage to be so; and therefore the plaintiff withdrew a juror, the premium having been paid into court.

In an action on a policy on *goods*, the insured cannot recover for freight *pro rata itineris* paid by the owner of the goods to the owner of the ship; where the ship is captured and detained by a foreign power, and afterwards restored.

Thus; in an action on a policy of insurance on goods, "At and from *Nevis to Bristol*," it appeared on the trial that the ship on her voyage was captured by the *French*, carried into *Morlaix*, and there condemned. Upon an appeal to the parliament of *Paris*, this sentence was reversed, and the ship and cargo were decreed to be re-

The captain's clothes, the ship's provisions, and goods lashed to the deck, are not within a policy on goods.

Refs v. Hunter, at N. P. after Hil. 16 G. III. Park 20.

The insured on goods, is not entitled to freight paid pro rata itineris, during capture.

Goods are insured, the ship and goods are captured and sold, but the sentence reversed, and the proceeds ordered to be paid to the owners: The

(a) Vid. sup. 225.

freight *pro rata itineris*, paid by the owner of the goods, is not a charge for which the insurers on the goods are liable.

Baillie v. Medigliani, Hil. 25
G. III. B. R.
MS.

The underwriters on goods are in no case liable for *freights*.

If the plaintiff declare upon a total loss, he may recover for a partial loss.

stored; or the net proceeds thereof, if sold, to be paid to the claimants. The ship and cargo having been sold before this sentence was obtained, the money, after deducting all charges, was remitted to the plaintiff, who was agent for the owners of the ship, the owners of the goods, and the underwriters.—The underwriters paid the charges of the suit, and all other expences. The plaintiff (the common agent) paid to the owners of the ship, freight *pro rata itineris*; and the question was, whether he was to be reimbursed by the owners of the goods, or whether this was a loss within the policy, for which the underwriters were liable.—The court, after time taken to deliberate, were unanimously of opinion, that the underwriters were not liable to this charge.—Lord Mansfield said;—"The question is, whether the owner of the goods can charge the underwriters with this *item*, which was paid for freight *pro rata itineris*, by the owners of the goods to the owners of the ship. As between the owners of the ship, and the owners of the cargo, in case of a total loss, no freight is due: But, as between *them*, no loss is total, where part of the property is saved, and the owner takes it to his own use. Here the value of the goods was restored in money, which is the same as the goods; and therefore freight was certainly due *pro rata itineris*. But, as between the insured and the underwriters *upon the cargo*, it is a contract of indemnity, and the latter have nothing to do with the *freight*. The owner of the ship has a lien for his freight; but in the case of a loss, really total, no freight is due. In the case of a loss, total as between the insurer and insured, with salvage, the owner may either take the part saved or abandon; but in neither case can he throw the freight upon the underwriters; because they have not engaged to indemnify him against it, and have nothing to do with it."

In assumpsit the plaintiff recovers damages according to the evidence *pro tanto*, and therefore he is not obliged to prove all the damage alleged in his declaration. Hence, though the plaintiff declare as for a *total loss*, he

he may recover as for a *partial loss*.—So, if he declare as for a total loss of the entire thing insured, when in fact he was only owner of, or interested in a *part* thereof, and the loss be only partial, yet he shall recover his proportion of such partial loss to part.

So if he declare for a loss upon an entire thing, when he is owner of only a part.

Thus:—An insurance was made on *one fourth* of a ship; and the insured declared expressly as for a *total loss* of the ship; but the evidence only proved a partial loss; nor was it attempted to prove a total one, the damage being so small that it might have been repaired for 50 l. —It was objected at the trial, on the part of the defendant, that evidence of a *partial loss*, was not sufficient to maintain a declaration for a *total loss*, and it was suggested that the practice was contrary.—A verdict, however, was taken as for a partial loss, subject to the opinion of the court on the above question.—The court were clearly of opinion with the plaintiff.—Lord Mansfield said;—"I was satisfied upon principles, provided the practice did not interfere; but, having heard of no determination in support of the practice alledged, the case must stand upon principles; and, upon principles, it is clear that the plaintiff may, upon this declaration, recover as for a partial loss. This is an action of *assumpsit*, which is a liberal action; and the plaintiff may recover *less* than his declaration would support, though not *more*. There are two grounds of the plaintiff's declaration; the policy, and the damage to the ship. Whether this be a total or a partial loss, is a question that goes to the *quantum of damages*, not to the *ground of the action*. The ground of the action is the same, whether the loss be total or partial; both are perils within the policy. As to the defendant's not coming prepared to defend a partial loss; this, indeed, would be an objection, if it were true: But the defendant does, in truth, come prepared to shew, either, that no damage had happened at all; or, at least, that damage had not happened to the extent alledged.—Neither could the defendant have been hurt by a judgment by default; for the plaintiff could not have recovered, upon the writ of enquiry, more

Upon an insurance on *one fourth* of a ship, Plaintiff declares as for a *total loss*; but proves only a *partial loss*, he shall recover such partial loss.

Gardiner v. Croasdale, 2 Bur. 904, 1 Bl. 198.

damages than he could prove that he had actually suffered. If this objection were to prevail, it would introduce the addition of unnecessary counts in the declaration. In an ejectment for more, the plaintiff may recover less: It is every day's practice."—Mr. Justice *Danison* concurred, and said ;—" In an action for damages, the plaintiff is to recover according to his proof, *pro tanto*; but he is not obliged to prove all that he has alledged. If it had been an action of covenant for pulling down a house, might not the plaintiff be intitled to damages for pulling down a part of it? This is no variance of the evidence from the declaration. The evidence tends, in a certain degree, to the proof of what is alledged in the declaration. Two counts would have been unnecessary."

One of several part owners of a ship may insure the freight generally, without mentioning what share he has in the ship; and he may declare generally, and recover according to his interest.

Rising v. Burnett,
at N. P. C. B.
12 December
1773. MS.

A fortiori if he prove a greater interest than he alledged.

Page v. Rogers,
at N. P. after
Hil. 1785, Park
402.

So, where the plaintiff was one of four part owners of a ship, and each insured the freight without mentioning that it was only a *share of the freight* that he was interested in.—The plaintiff, in his declaration, stated his interest generally, and not as being an *aliquot part* of the ship.—It was objected on the part of the defendant, that the plaintiff should have alledged his interest according to the truth, and not in that general form. That the register of the ship, which was produced, was conclusive evidence as to the persons who were owners, and of their respective shares; and the register shewed that the plaintiff was only owner of the fourth part.—Mr. Justice *Buller*, who tried the cause, held, that this being an open policy (a), the plaintiff might recover according to his interest; and he had a verdict accordingly.

So, if the plaintiff prove a greater interest than he alledged in his declaration, this shall not preclude him from recovering to the extent of the interest he has alledged.

Thus, where the declaration stated that the plaintiff was possessed of *one third* of the ship insured; and it was proved that he had purchased the *whole* at one period.

(a) Had it been a *valued policy*, it would have made no difference in this case; for the insurer may dispute the amount of the interest of the insured if it be over-valued, as well in an action upon a valued policy, as upon an open one.

There being no evidence to shew that he had since parted with any share of it, it was insisted that this was a variance.—But Lord *Mansfield* held that this was sufficient evidence; for, *omne majus continet in se minus*; and overruled the objection.

By the preamble to the second section of the stat. 19 G. II. c. 32, it appears that, before the passing of that act, if an obligor in any bottomry or respondentia bond, or an insurer in any policy of insurance, became bankrupt before a loss happened, it was made a question whether the insured in such policy, or the obligee in such bond, could be let in to prove his debt, or to receive any dividend under the commission: But now, by that section, it is provided, 'That such obligee or insured shall be admitted to claim, and after the loss or contingency shall have happened, to prove, his debt, and to receive a dividend of the bankrupt's estate, in proportion to the other creditors; and that the bankrupt shall be discharged from the debt owing from him on such bond or policy, in like manner as if such loss or contingency had happened, and the money had been payable, before the issuing of the commission.'

By 19 G. II. c. 32., if an underwriter become bankrupt before a loss happen, the insured may claim; and after a loss, prove his debt under the commission, and receive his dividend, as if the loss had happened before the Bankruptcy.

As the words of the above preamble refer only to bottomry contracts, and insurances on ship and goods on board, it became a doubt whether it extended to *insurances upon lives*, though the words of the enacting part are general; and it was supposed that the legislature could not have had insurance upon lives in contemplation, because the risk in such insurances may remain unsettled for many years:—But it has been determined that the general words of the enacting part are not restrained by the preamble; and that it comprehends *all insurances*, and consequently *insurances upon lives* (a);

This statute extends to insurances upon lives.

(a) *R. Cox v. Loflard*, B. R. Hil. 24 G. III. Doug. 166, n. Vid. *Pattison v. Banks*, Cowp. 540; and *Mace v. Cadell*, Cowp. 232.

BOOK THE SECOND.

Of Bottomry and Respondentia.

THIS subject may be treated under the following distribution ;

1. Of the nature and form of the contract ;
2. Of the parties to it ;
3. Of the thing hypothecated ;
4. Of the principal and marine interest ;
5. Of the perils or risks to which the lender is liable ;
6. Whether he be liable to *general average* ;
7. Whether he be entitled to the *benefit of salvage*.

C H A P. I.

Of the Nature and form of this Contract.

Bottomry defined.

BOTTOMRY is a contract in nature of a mortgage of a ship, on which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed ; and he pledges the keel or *bottom* of the ship, *pars pro toto*, as a security for the repayment : And it is stipulated that if the ship should be lost, in the course of the voyage, by any of the perils enumerated in the contract, the lender also shall lose his money ; but if the ship should arrive in safety, then he shall receive back his principal, and also the interest agreed upon, which is generally called the *marine interest*, however this may exceed the legal rate of interest (a). Not only the ship

(a) Vid. 2 Bl. Com. 458.

and tackle, if they arrive safe, but also the person of the borrower, is liable for the money lent and the marine interest.

When the loan is not on the ship, but on goods laden on board, which, from their nature, must be sold or exchanged in the course of the voyage, the borrower's personal responsibility is then the principal security for the performance of the contract, which is therefore called *respondentia* (a). In this consists the principal difference between bottomry and *respondentia*. The one is a loan upon the ship, the other upon the goods. In the former, the ship and tackle, being hypothecated, are liable, as well as the person of the borrower; in the latter, the lender has, in general, only the personal security of the borrower. But the personal responsibility of the borrower is not in all cases, the only security of the lender. Where the money is lent for the outward and homeward voyage, the goods of the borrower on board, and the returns for them, whether in money, or in other goods purchased abroad with the proceeds of them, are liable to the lender (b). The money is to be repaid to the lender, with the marine interest, upon the safe arrival of the ship, in the one case, and of the goods, in the other. In all other respects, these contracts are nearly the same, and are governed by the same principles.

Respondentia.

Difference between them.

The contract of bottomry is called by the French, *contrat de prêt à la grosse aventure*, or *contrat à la grosse*. In *Le Guidon* (c) it is called *bomerie*, and *Molloy* (d) says that it is derived from *bomerie* or *bodmerie*, a Flemish word which signifies the keel or bottom of a ship.

Denomination.

Though it is extremely probable, as we have already shewn (e), that the contract of insurance was unknown among the ancients, it is certain that the Romans were well acquainted with that of bottomry, or rather *respondentia*, which they denominated *nauticum fœnus* or *contractus tra-*

In use among the Romans.

(a) 2 Bl. Com. 458.—(b) *Potbier*, h. t. n. 34. *Emerig.* t. 2, p. 476. 561.—(c) Ch. 18.—(d) *De jur. marit.* b. 2, c. 11, § 12.—(e) *Sup.* 5.

Pecunia trajectitia.

jectitia pecunie; and it is treated of both in the *Digest* and the *Code, de nautico fœnore*. They called the sum lent *pecunia trajectitia*, perhaps because the borrower was used to take the money on board with him in specie, in order to employ it in trade in the course of the voyage; for such was probably the original destination of such loans among the *Romans*, who exported very little from *Rome*, but sent money from thence to purchase the merchandize which the immense consumption of that city demanded. The money thus lent was to be repaid, if the voyage proved fortunate, with a stipulated interest, which was called *periculi pretium*, sometimes *usura maritima*, or *usura nautica*; but upon this condition, that if the ship should be lost by the perils of the sea, in the course of the voyage proposed, the lender should lose both principal and interest.

If the money was spent on shore, it was not *pecunia trajectitia*.

If the money was spent in the place where it was lent, it was not *pecunia trajectitia* (a). But if it was laid out in the purchase of goods, which were embarked at the risk of the lender, then it retained its quality of *pecunia trajectitia*. So that, with the *Romans*, as with the moderns, it was of the essence of this contract that the loan should be exposed to the perils of the sea, at the risk of the lender.

Whether the *Roman nauticum fœnus* be materially different from the modern bottomry.

The author of *Le Guidon* (b) says that there is but little resemblance between the contract of bottomry, as it is in use in modern *Europe*, and the *nauticum fœnus* of the *Romans*. But upon an attentive comparison of the one with the other, it will appear that they are still in principle the same; and only differ in the forms which modern regulations have given to the contract now in use.

How bottomry differs from a simple loan.

Bottomry differs very materially from a simple loan. In a loan, the money is at the risk of the borrower, and must be paid at all events. *Lucendum ære alieno non liberat debitorem* (c). But in bottomry, the money is at

(a) Si eodém loci consumatur, non erit trajectitia, ff. de neut. fœn. 1.—(b) Ch. 18, art. 1.—(c) Cod. l. 11, si cert. pet.

the risk of the lender during the voyage. Upon a loan, only the legal interest can be reserved: But upon bottomry, any interest may be legally reserved which the parties agree upon.

The analogy between this contract and that of insurance is much stronger. In the one the lender, in the other the insurer, is liable to the perils of the sea; the one receives the marine interest, the other the premium, as the price of the risk, which varies in each according to the length and danger of the voyage. The lender and the insurer are, in general, exposed to the same perils, which have the same commencement and end. The marine interest, like the premium of insurance, is not due, if no risk be run, though this be prevented by the voluntary act of the borrower.

Analogy between bottomry and insurance.

But though these contracts thus far agree, they differ essentially in many respects. In bottomry, the lender furnishes the borrower with the money to purchase the goods which are put in risk; an insurer, on the contrary, furnishes nothing of the subject matter of the insurance.—The lender, in taking on himself the risk of the goods, does not contract any obligation to the borrower; a loss by the perils of the sea does not make him a debtor to the borrower, but only prevents the borrower from becoming his debtor: Whereas, upon a loss happening, the insurer becomes a debtor to the insured to the amount of such loss, not exceeding the sum insured (a).—In case of shipwreck, the lender, by the general law, has a *lien* on the effects saved, to the extent of the sum lent and the marine interest, *to the exclusion of the borrower*; whereas an insured has an interest in the effects saved, *in common with the insurer*, so far as he was uninsured.—The lender is not liable for particular average; but the insurer is liable for this, unless he be exempt by express stipulation.—By the clause, *free of average*, insurers may be exempted from general average; but, in a case where the lender is liable by law to gene-

How they differ.

(a) *Pothier*, h. t. n. 6.

ral average, such a clause would be illegal and void (a). If the voyage be divisible into several distinct risks, the premium of insurance may be apportioned to each, and there may be a return for such as have not been begun; but, in bottomry, if the risk be once commenced, and no loss happen, the marine interest must be paid entire (b).

The utility of
this contract.

This contract is of great utility in a country where the persons engaged in trade have not a sufficient capital to carry on their foreign commerce, by inducing those unskilled in trade to embark their money in it; and thus is formed a sort of partnership between the lender and the borrower, in which the one supplies capital, the other skill and experience: The one takes upon himself the perils of the sea, and the other compensates him by a share of the profits of the adventure. But, except in this respect, this contract has no resemblance to a regular partnership, having in it no community of capital, no community of loss (c).

Not now in
use in this
country.

Formerly the practice of borrowing money on bottomry and respondentia was more general in this country than it is at present. The immense capitals now engaged in every branch of commerce, render such loans unnecessary; and money is now seldom borrowed in this manner, but by the masters of foreign ships who put into our ports in need of pecuniary assistance to refit, to pay their men, to purchase provisions, &c. Sometimes officers and others belonging to ships engaged in long voyages, who have the liberty of trading to a certain extent with the prospect of great profit, but without capitals of their own to employ in such trade, take up money on respondentia to make their investments: But even this, as I am informed, is now not very frequently done in this country.

(a) *Pothier*, h. t. n. 46; *Valin*, on art. 16, h. t.; *Emerig.* t. 2, p. 505.—(b) *Emerig.* t. 2, p. 397.—(c) *Sav. Diſc.* h. t. *Casaregis* disc. 7, n. 2; *Emerig.* t. 2, p. 394.

This contract, which must always be in writing, is sometimes made in the form of a deed poll, called a bill of bottomry, executed by the borrower (*a*), sometimes in the form of a bond or obligation, with a penalty (*b*). But whatever may be its form, it must contain the names of the lender and the borrower, those of the ship and the master; the sum lent, with the stipulated marine interest; the voyage proposed, with the duration of the risk which the lender is to run: It must shew whether the money be lent on the ship, or on goods on board, or on both; and every other stipulation and agreement which the parties may think proper to introduce into the contract (*c*).

It is usually either in the form of a deed poll or a bond.

It is essential to this contract that the marine interest be expressly reserved in it (*d*). *Straccha* (*e*), indeed, holds that, without this, the law would look upon the contract only as a simple loan, upon which the lender had gratuitously taken upon himself the perils of the sea. *Emerigon*, however, holds (*f*) that this being a contract founded in good faith, equity will supply the omissions occasioned by mistake or inadvertance; and that, as the lender subjects himself to the perils of the sea, and the borrower reaps the fruits of the adventure, commutative justice requires that the former should receive, beside the legal interest of his money, a satisfaction for the risk he has run.

The marine interest must be expressly reserved in it.

Whether equity would supply the omission of this.

(*a*) Vid. Append. N^o. VI.—(*b*) Vid. Append. N^o. VII.—(*c*) Vid. *Pothier*, h. t. n. 30; *Emerig.* t. 2, p. 402.—(*d*) *Pothier*, h. t. n. 19.—(*e*) *Introductio*, n. 24.—(*f*) t. 2, p. 406.

C H A P. II.

Of the Parties to this Contract.

Who may lend
on bottomry.

THE parties to the contract of bottomry are the lender and the borrower. Of the former, it is sufficient to say, that any person, who is in a capacity to contract, may lend money on bottomry.

Who may borrow.

With respect to the borrower, every person who has a vested assignable property in a ship or cargo, may, by the general law of merchants, borrow money on bottomry or respondentia thereon, to the extent of his interest.

When the master may hypothecate the ship.

This contract seems originally to have arisen from the practice of permitting the master of a ship, in a foreign country, to hypothecate the ship, in cases of necessity, in order to raise money to refit (*a*). And it is essential to the safety of the ship and the success of the voyage, that the master, in the absence of the owners, should have this power, which is, indeed, by the marine law, implied in his appointment (*b*).

He can only do this in the absence of the owners.

But as the owners are presumed to give entire authority to the master, only in their absence, and for such affairs as they cannot themselves conveniently transact, he is not in fact master till after he sets sail. Till then, he is subject to their orders, and they have the power of dismissing him at pleasure; till then, therefore, he can transact no business of importance, but under their immediate directions (*c*). Hence, if the master borrow money on bottomry in the place where the owners reside, without their express authority, it can only affect his own interest on board. Yet, it is said that, if the money thus borrowed be beneficially employed in supplying the necessities of the ship, and in discharge of the owners, they are liable for the money thus laid out (*d*). But this liability must be understood as for money paid for their use, not upon the contract of bottomry.

Yet, if money borrowed where the owners reside be laid out on the ship, the owners shall be liable for it.

(*a*) Vid. 2 Bl. Com. 458.—(*b*) Per Holt, C. J. in *Bernard v. Bridgeman*, Hob. 12.—(*c*) Consolato del mare, ch. 236.—(*d*) *Finnius*, ad ff. de exercit. § 4, p. 844.

Even in a foreign country, and in the absence of the owners, the master cannot take up money on bottomry, for any debt of his own (a), but only for the use of the ship, in cases of necessity; and this must appear in the written contract, otherwise the lender will neither have a *lien* on the ship, nor an action against the owners. The master in such case would be alone liable, though it should appear that the money was spent in supplying the necessities of the ship (b). Hence it would seem that originally the lender was bound to see to the application of the money advanced by him, and that he was obliged to prove this, to entitle himself to recover against the owners. But, as the law now stands, if it appear that the money has been fairly and regularly lent to supply the necessities of the ship, the misapplication of it by the master will not affect the claim of the lender, who will have his action against the owners and his *lien* on the ship, without proving that the money was properly applied. He has no reason to mistrust the master, whom the owners have employed. But if he be an accomplice in any fraudulent misapplication of the money, the owners may impeach the contract upon that ground (c).

Even in a foreign country the master can only borrow money in case of necessity.

And this must appear in the contract.

But the lender is not bound to look to the due application of the money.

In a former part of this work (d), it was shewn that no British subject can legally trade with the enemies of the state in time of war; and that even an insurance upon such trading is void. It was also shewn that the insurance of the ships and effects of the enemy has, on several occasions, been prohibited by statute; and many arguments and authorities have been adduced to prove that, even at common law, such insurances are illegal. It is needless to repeat those arguments here, every one of which applies with equal, if not greater, force, to prove that the lending of money to the enemy upon bottomry is illegal, if not highly criminal.

Whether money may be legally lent on bottomry to an enemy, in time of war.

(a) *Molloy*, b. 2, c. 2, § 4. *Laws of Oler.* art. 1, 22.—
(b) ff. de exercitiis art. 7, *Vinnius*, ad id. *Emerig.* t. 2, p. 434.—
(c) *Loccen.* l. 2, c. 6. n. 12. *Emerig.* t. 2, p. 441.—
(d) *Sup.* 70.

C H A P. III.

Of the Thing hypothecated.

Money may be lent on whatever may be insured.

IT is a general rule that money may be lent on bottomry or respondentia, on whatever may be the subject matter of insurance. It may be lent on the body, tackle, furniture, and provisions of the ship, or upon all, or any part of the cargo; or upon both ship and cargo (*a*).

The borrower may take the money on board with him.

But money may be borrowed on respondentia without hypothecating any thing. The borrower may, and frequently does, take the money on board with him in specie, in order that he may employ it in trade in the course of the voyage; which, as has been already observed (*b*), was probably the original intention of such loans.

But the money, or its equivalent, must be exposed to the perils of the sea, at the risk of the lender.

But it is of the essence of this contract that the money lent, or something equivalent to it, be exposed to the perils of the sea, at the risk of the lender. And the same reasons of policy which forbid gaming insurances equally apply to wagers in the form of bottomry loans. If the borrower has no effects on board; or having some, he borrows much beyond their value, and agrees to pay a high marine interest, this will afford a strong ground to suspect fraud, and that the voyage will have an unfortunate end. *Cum capitaneus, ad cambium receperit longe majorem pecunia sumnam quam fuerit riscum super navi existens, presumi debet sinistrum fuisse dolum (c).*

This practice restrained by stat. 2. C. 2, c. 11.

Our legislature long since found it necessary to restrain the mischiefs resulting from this practice, and therefore by stat. 16. C. II, c. 6, re-enacted and made perpetual by the stat. 22 C. II, c. 11, § 12, after reciting that,

(*a*) Pothier, h. t. n. 9.—(*b*) Sup. 634.—(*c*) Casaregis, disc. 62, n. 7; Vid. *Le Guidon*, ch. 19, art. 10.

“Whereas it often happeneth that masters and mariners
“of ships having insured or taken upon bottomry, greater
“sums of money than the value of their adventure, do
“wilfully cast away, burn, or otherwise destroy the ship
“under their charge, to the merchants and owners
“great loss;” for the prevention thereof for the future,
enacts, ‘That if any captain, master, mariner, or other
‘officer belonging to any ship, shall wilfully cast away,
‘burn, or otherwise destroy the ship unto which he be-
‘longeth, or procure the same to be done, he shall
‘suffer death as a felon.’

At *Leghorn* and some other parts of *Italy*, where gaming insurances are tolerated, wagers in the form of bottomry contracts are also allowed (*a*).—In *France*, it was the wise policy of the framers of the famous ordinance of 1681, to prohibit all gaming and wagering upon the events of the maritime adventure; and therefore they did not only forbid all gaming insurances, but also all wagers in the form of bottomry contracts. It is therefore provided (*b*) that, in case of loss, the borrower upon goods shall not be discharged without proving that he had goods on board at the time of the loss, on his own account, to the amount of the sum lent.

In *England* it was not unusual, before the stat. 19 G. II. c. 37, for persons to borrow money *on the voyage*, as it was called; that is, where the borrower, having nothing, either in the ship or cargo which he could hypothecate, took up money on his own personal credit, and on the credit of his sureties if he had any. The money thus borrowed was often taken on board, and usually employed in some commercial adventure depending on the success of the voyage; and therefore this might generally be considered as a legitimate loan upon respondentia. But the spirit of gaming having availed itself of this form of contract to cover wagers, particularly in long

Wagers, in the form of bottomry contracts, are permitted in some parts of *Italy*.

They are prohibited in *France*.

And this species of gaming coming into use in *England*, the 19 G. II. c. 37, § 5, directs that, upon *East India* voyages the money shall only be lent on the ship or goods on board, with benefit of salvage to the lender.

(*a*) *Casaregis*, disc. 14, 15.—(*b*) Ord. de la mar. h. t. art. 3, 14; vid. *Emerig.* t. 2, p. 496, 500; *Valin*, on art. 3, 14, h. t.

voyages, the stat. 19 G. II. c. 37, after prohibiting insurances without interest, declares (§ 5.), ‘That all money lent on bottomry or at respondentia, upon any ship or ships belonging to any of his Majesty’s subjects, bound to or from the *East Indies*, shall be lent only on the ship, or upon the merchandizes on board, and shall be so expressed in the condition of the bond; and the benefit of salvage shall be allowed to the lender, who alone shall have a right to make insurance on the money so lent; and in case it shall appear that the value of his share in the ship, or the effects on board, does not amount to the full sum or sums he has borrowed as aforesaid, such borrower shall be responsible to the lender for so much of the money borrowed as he has not laid out on the ship or merchandize laden thereon, with lawful interest for the same, in the proportion the money laid out shall bear to the whole money lent, notwithstanding the ship or merchandize shall be totally lost.’

Whether a wager, in the form of a bottomry loan, be a legal contract at common law.

It is said (a) that, as *East India* voyages only are mentioned in this act, and that as *expressio unius est exclusio alterius*, it follows that bottomry loans, where the borrower has nothing on board, may be legally made in all other cases, as at common law, except in the cases prohibited by the stat. 7. G. II. c. 21, § 2. (b).

It is certainly not a little singular that the same legislature which thought it necessary to prohibit such loans upon *East India* voyages, should not have thought the same prohibition equally necessary in all other cases. Yet, I cannot, in this case, admit the application of the maxim, *expressio unius est exclusio alterius*. If, indeed, the maxim were, *exclusio unius est recognitio alterius*, it might be more applicable. But such a maxim would have the effect of proving, that a statute which should be made to restrain one particular abuse, would sanction all others of the same nature; which is manifestly ab-

(a) *Park*, 411.—(b) *Vid. inf.* 643.

furd. But, be this as it may, such an inference is not sufficient to prove that a species of gaming so mischievous in its tendency had ever been sanctioned by the common law. Nothing short of a solemn decision of one of the supreme courts of *Westminster*, could give to such doctrine the stamp of authority; and I believe there has not yet been such a decision.

Many *British* subjects having, in the reign of *George I.*, fitted out ships and clandestinely traded to the *East Indies* under colour of foreign commissions, the stat. 7 G. I. c. 21, § 2, made to restrain these practices, and to protect the monopoly of the *East India* company, amongst other regulations, declares, 'That all contracts and agreements, made or entered into by any of his majesty's subjects, or any person or persons in trust for them, for the loan of any money by way of bottomry, on any ship or ships in the service of foreigners, and bound to, or designed to trade in, the *East Indies*, shall be void.'

The stat. 7 G. I. c. 21, prohibits the lending money on bottomry on foreign *East India* ships.

It is said (a) that this act does not mean to prevent the king's subjects from lending money on bottomry on foreign ships, trading to their own settlements in the *East Indies*; and it must be owned that, from the preamble to the act, it would seem that it had only in view to restrain the illegal commerce of *British* subjects with the *East Indies*, without any reference to that of foreigners; yet the above clause expressly, and in the most unqualified terms, restrains the lending of money on bottomry on any ship or ships in the service of foreigners (b). Whether a ship, the property of *British* subjects, fitted out by them, and laden with their merchandize, can be said to be in the service of foreigners, merely because she is furnished with a commission from a foreign state, is a question upon which there has not been yet any judicial decision.

Whether this act restrains the lending of money to foreigners trading to their own settlements in *India*.

In the year 1789 an action was brought in the court of Common Pleas, on a respondentia bond, executed by the defendant, an *American*, to secure the payment of a

It would seem that a respondentia bond for money lent by a *British* subject, upon goods on board an *American* ship, on a

(a) *Park*, 412.—(b) *Vid. sup.* 631.

voyage from
Bengal to Rhode
Island is void.

Sumner v. Green,
1 H. Bl. 301.

cargo of goods shipped by the plaintiff, a *British* subject at *Calcutta*, on board an *American* ship, homeward bound, from *Calcutta* to *Rhode Island*. The ship had sailed from *England* and landed a cargo of *European* goods in *Bengal*, previous to her taking in the cargo, on which the bond was given.—The defendant, being arrested on the bond, moved to be discharged out of custody on entering a common appearance, on the ground that, since the independence of the *United States*, an *American* ship was a *foreign ship* within the meaning of the above stat. 7 G. I. c. 21, § 2.—The court discharged the defendant.—Lord *Loughborough* said,—“ We do not think it necessary, upon this application, to give any decided opinion upon this act; but it would be improper to hold the defendant in custody, if there appears a probable ground that the contract which is the foundation of the action is void. I do not chuse to enter into the construction of the statute; but I think it probable that, in its true meaning, it would reach all trading to the *East Indies* for the purpose of sending goods to other parts of the world, contrary to the provisions of the company’s charter.”

Money may be
borrowed on
freight.

In *France* money
cannot be bor-
rowed on freight,
or on profit.

By the law of *England*, freight, as we have already shewn (a), may be insured, and consequently it may be hypothecated upon a bottomry contract.

In *France* the borrowing of money by the owners of a ship, on freight not earned, is prohibited (b). The reason, as *Valin* informs us (c), is, because the lender would be at the mercy of the borrower, who would not much concern himself about freight, from which he could derive no profit. But it is permitted to borrow money on freight already earned; that is, where the money borrowed is to be employed by the *affreighter*, in paying freight which he is bound to pay at all events. Freight, in that case, being an expence which the *affreighter* must lose if the ship should be lost without completing her voyage, is a proper subject of insurance, and consequently of a bottomry loan (d). Nor is

(a) Sup. 75.—(b) Ord. de la mar. h. t. art. 4.—(c) *Valin* on art. 4, h. t.—(d) Vid. sup. 75, 76.

it permitted by the *French* law to borrow money on bottomry on the profits expected upon goods, because profit is uncertain, and has no physical or substantial existence on board (a).

Seamen may undoubtedly borrow money on any goods they may have on board; because, as far as relates to such goods, they are in the same situation as those of any other shipper. As to their *wages*, the same reasons of policy, drawn from the necessity of interesting them in the preservation of the ship, which prohibit their being insured, equally forbid their borrowing money on them (b).

Seamen may borrow money on their goods on board; but not on their wages.

Whether money may be lent on a ship or goods already exposed to the perils of the sea, is a question upon which some learned men have differed.—*Valin* (c) holds, that it makes no difference whether the loan be made before the ship's departure or afterwards; because, says he, the presumption is, either that the money has been usefully employed in the things put in risk, or in paying what was due on that account.—*Emerigon* (d), on the contrary, supposes that the original idea of bottomry was, that the money borrowed should be bestowed on the ship, or vested in goods for exportation (e); and that, upon this principle, this species of loan has been permitted and encouraged: But that, as soon as the ship sets sail the motive to this ceases; and a loan, after the ship's departure, could not be said to have purchased the goods already exposed to the perils of the sea.—This is plausible, but *Valin's* reasoning seems the most satisfactory.

Whether money may be lent on a ship or goods already in risk.

(a) Ord. de la mar. h. t. art. 4, *Pothier*, h. t. n. 14. *Emerigon*. t. 2, p. 480. Vid. sup. 78. Vid. *Bynk.* quæst. jur. priv. lib. 4, c. 5, in which he cites a decision of the senate of *Rotterdam*, to shew that *lucrum quod speratur, per leges nauticas, affectuari non posse*.—(b) *Emerigon*. t. 2, p. 480.—(c) On art. 16, tit. de la saisie, t. 1, p. 346.—(d) *Tôm.* 1, p. 484.—(e) *Trajectitia ea pecunia est quæ trans mare vehitur:—Sed videndum an merces ex eâ pecuniâ comparatæ, in eâ causâ habeantur; et interest, utrum etiam ipsæ, periculo creditoris, navigent; tunc enim trajectitia pecunia sit.* ff. de naut. fœn. 1.

C H A P. IV,

Of the Principal, and marine Interest.

Of what the loan
may consist.

TO constitute this contract, one party must lend the other a sum of money upon the usual conditions. Not that this contract could only be made upon a loan of money; for, as a loan, it may consist, according to the *Roman law*, of all those things *quæ pondere, numero, et mensurâ constant, et quæ usu consumuntur* (a). In practice, however, such loans are scarcely ever made but in money (b). *Emerigon*, indeed, mentions an instance of a loan of six dozen of *Morocco* skins, which were lent on *respondentia*, and a security given for the sum at which they were valued, with marine interest at *cent, per cent.* (c).

The principle
upon which ma-
rine interest is
allowable.

Bottomry, as has been already observed, differs from a simple loan in this, that, in the latter, the borrower takes the risk upon himself, and must repay the money at all events; whereas the lender on bottomry takes on himself the risk arising from the dangers of the sea, and is only to be repaid in the event of a safe arrival. He may therefore legally stipulate that, in the event of a safe arrival, he shall be paid, beside the sum lent, not only a compensation for the *use* of his money, but also the price of the risk. And as it is impossible to fix any rule by which this can be precisely ascertained, it must in all cases be settled by the agreement of the parties (d). *Trajectitia pecunia, propter periculum creditoris; quamdiu navigat navis infinitas usuras recipere potest* (e). *Justinian*, however, after prohibiting the *centesima* (which was one *per cent. per month*, or twelve

(a) ff. l. 2, de reb. cred. § 1.—(b) *Pothier*, h. t. n. 8.—
(c) *Emerig.* t. 2, p. 412.—(d) *Vid. Pothier*, h. t. n. 2.—
(e) *Paul. sent.* 3, 11, 14.

per cent. per annum), in ordinary cases, permitted it in this contract, and forbid any higher interest (*a*).—Such a rule might have been proper in a country where navigation was confined to mere coasting voyages, and where the principal difference between the risk of one voyage and another consisted in the time in which each might be performed. But, in modern times, when commerce is carried on between countries the most remote from each other, it would be impossible to fix any precise standard by which the rate of marine interest could be properly regulated.

The marine interest, therefore, however high or exorbitant it may seem, cannot be deemed usury, provided the money lent be *bond fide* put in risk. Several attempts, however, have been made to call in question the legality of such contracts; but, in every instance, the courts, both of law and equity, have held that if the principal be *bond fide* put in risk, the contract is legal, however high the marine interest reserved may be (*b*).—If, indeed, the form of a bottomry or respondentia loan be used as a cloak to an usurious contract, there can be no doubt but that it would be illegal and void.

It is of the essence of this contract that the sum lent be put in risk; and it does not, in truth, become a bottomry or respondentia contract, till the risk commences. Therefore, by the *Roman* law, if the borrower had spent the money on shore, and did not expose it to the perils of the sea, it was not deemed bottomry, but only a simple loan at common interest (*c*). And by the general law of merchants, at this day, the contract of bottomry, like that of insurance, is merely *executory*, till the risk has

Legality of it.

It is only due where the risk has been commenced.

If the risk be not commenced, the contract will become a simple loan; even

(*a*) Cod. lib. 4, tit. 32, de usur. 26.—(*b*) *R. Sharpley v. Hurrell*, Cro. J. 208; Per *Doddridge, J.* in *Roberts v. Trenayne*, Cro. J. 508; *R.* in *Joy v. Kent*, Hard. 418; *R.* in *Soome v. Gleen*, 1 Sid. 27, 1 Lev. 54; Vid. *Dandy v. Turner*, 1 Eq. Ca. Ab. 372; *R. De Guilder v. Depeyster*, 1 Vern. 236; *R. Anon.* 2 Ch. Ca. 30.—(*c*) ff. de naut. fæn. 1.

though the borrower covenant to perform the voyage.

been commenced; and the borrower, like the insured, may, at his pleasure, by giving up the voyage proposed, or by not shipping the goods on which the money was lent, prevent its ever taking effect. For, however it may have happened, that the risk was never commenced, it is sufficient that this has happened, to turn the contract into a simple loan, at common interest. The marine interest can only be due in respect of the principal having been actually put in risk; nothing else can give the lender a legal claim to it. And this is so, even where the borrower covenants to perform the voyage mentioned in the contract within a limited time (a).

De Guilder v. De Pijsler,
1 Fern. 263.

Therefore, where the borrower was bound, in consideration of 400 l., the sum lent, to perform the voyage mentioned in the bond, within six months; and also, at the expiration of that time, to pay the 400 l. and 40 l. premium, in case the vessel arrived safe; and it happened that the ship never failed on the voyage, whereby the bond became forfeited.—The borrower brought his bill in equity to be relieved; and it was there decreed, that, as there had been no hazard of losing the principal, the lender must give up the premium, and be content with his principal and *ordinary interest*.

What allowance ought to be made to the lender, where the risk has not been commenced.

To the simple interest payable, in such cases, on the sum borrowed, *Valin* (b), by analogy to the practice in cases of insurance, holds that one half *per cent.* upon the marine interest, ought to be paid by the borrower who has failed in the contract, in case the lender has insured his principal.—*Emerigon* (c) approves this; but adds, that if the borrower be not in fault, it will be sufficient to repay the sum lent, with the ordinary interest. To me it seems but reasonable that the lender should, in every such case, receive not only his principal and interest, but also one half *per cent.* upon the marine interest, and all charges of insurance.

(a) *Pothier*, h. t. n. 38, 39.; *Valin* on art. 15, h. t.; *Emerigon*, t. 2, p. 494.—(b) On art. 15, h. t.—(c) *Tom.* 2, p. 496.

In general, as soon as the risk ceases, (*discusso periculo*), either by the ship's safe arrival, the expiration of the term, or any other event, the marine interest ceases, and the debt becomes absolute. From that time, if the borrower delays payment, it bears only ordinary interest (a).

When the risk ceases, the marine interest ceases.

If the contract be for a certain number of months, either at a specific sum, or at so much *per month*, and so at that rate, for any longer time, not exceeding a fixed period; and the voyage be performed within the period first limited, the marine interest for the whole of that period, will nevertheless be due: But if it exceed the latter period, the risk of the lender will cease, and the debt become absolute, though the voyage should not be ended. *Post diem prestitam, et conditionem impletam, periculum esse creditoris definit* (b).

When the time of the risk is limited, the risk and the marine interest will end with the time, though the voyage be not ended.

And this holds even where the ship has been prevented by inevitable accident, from performing her voyage within the time limited.—As where money was lent on bottomry, with a condition, that if the ship, which was bound to the *East Indies*, should return to *London* within 36 months, or if she should not return within that time, and should not be taken or lost within that time, the money to be paid, &c. *The ship was detained at Surat in India, by an embargo laid by the Mogul, till after the 36 months were elapsed, and in her return home was taken; so that the bond was forfeited. But there being no fault in the master, and the voyage being thus delayed by inevitable accident, the borrower brought his bill to be relieved against the penalty of the bond.—But Lord Harcourt, Ch. said,—“I cannot relieve in this case, against the express agreement of the parties.—If the lender has insured this money upon the ship, the borrower shall have the benefit of the insurance, upon allowing the lender the charges of the insurance, and paying him the money in three months.”*

And the risk of the lender will cease, though the ship was prevented by inevitable accident from performing her voyage within the time limited.

Ingledew v. Foster, 4 Vin. Ab. 281.

(a) ff. de naut. scen. 4.—(b) ff. ut. sup.

If the marine interest be agreed to be paid for the first six months, though the ship should be lost; whether this be a legal contract.

Emerigon puts a case, where it is stipulated that 12 per cent. shall be paid for the first six months; and that this shall be payable, *though the ship should be afterwards lost*. And he seems to be of opinion that, if the ship be lost after the six months, the lender is not entitled to the six months' interest.—He says that if the borrower had remitted the interest for the first six months, the lender might fairly receive it; but that, if he should not, from the profits of his trade, have been enabled to do this, he would be discharged from all obligation (a).—This distinction is founded on principles much too vague and indefinite to be received as law. With us, the contract would not be usurious, because the sum lent would be put in hazard; and being legal, it would be binding upon the borrower, whatever might be the ultimate success of the adventure. In such a case, the first six months would be considered as a distinct risk.

Common interest begins to run on the principal, as soon as the risk ends.

If, when the sea-risk is ended, the borrower delays payment, the common interest begins to run, *ipso jure*, without any demand. *Discussio periculo majus legitimâ usurâ non debetur* (b). But this interest runs only on the principal, not on the marine interest; for this would be interest upon interest: *Accessio accessionis non est* (c).

(a) *Emerig. t. 2, p. 518.*—(b) ff. de naut. fœn. 4.—(c) *Pothier, h. t. n. 51. : Emerig. t. 2, p. 414.*

CHAP. V.

Of the Perils or Risks to which the Lender is liable.

IT is essential to this contract, not only that the money be lent on a ship or goods, but likewise that these be exposed to the perils of the sea, at the risk of the lender; that is, that the repayment of the sum lent, and the marine interest, shall depend on the safe arrival of the ship (a). The perils of the sea, in a large sense, comprehend all those accidents and misfortunes to which ships at sea are exposed, and which no human foresight or precaution can avert or resist; *Vis divina, que præcaveri, & cui resisti, non potest*. This idea seems to be very fully expressed in the usual terms of our bottomry and respondentia contracts; by which it is provided that, ‘if, in the course of the voyage, and within the time prescribed, an utter loss of the ship, by fire, enemies, men of war, or any other casualties, shall unavoidably happen,’ the bond shall be void, and the borrower discharged. So that the perils to which the lender is exposed, are nearly the same as those to which the underwriters upon a policy of insurance are liable (b).

It is essential to this contract, that the lender run the sea-risk.

The perils are nearly the same as in insurance.

Though a loss by pirates is not usually expressed in bottomry or respondentia securities; yet this is a risk within the meaning of the words; piracy being one of the casualties to which ships at sea are liable (c).

A loss by pirates is within the contract.

But

(a) *Pothier*, h. t. n. 16, 38.—(b) *Vid. Le Guidon*, ch. 18, art. 2. *Valin* on art. 11, h. t. and on art. 6, tit. *des assurances*; *Pothier*, h. t. n. 16. *Vid. sup.* 416.—(c) *R. in Barton v. Wollisford, Comb.* 56. But this was not a question upon a bottomry contract, as has been supposed. *Park* 421. It arose in an action on a bill of lading, to which the defendant pleaded

Nothing short of a total loss will discharge the borrower.

But whatever may be the perils to which the lender is liable, nothing short of a total loss will discharge the borrower. The obligation remains, however the goods may be damaged by the perils of the sea. Nor is there any deduction on account of such damage; for the lender is not bound to contribute to simple average or particular damage, unless by express agreement. In this respect, the lender on bottomry is in a better situation than an insurer, who is obliged to indemnify the insured, to the extent of the sum insured, from all damage arising from any of the perils insured against. A capture, therefore, to have the effect of discharging the borrower, must be such a taking and detention as would amount to a total loss in a case of insurance: A mere temporary detention will not discharge the borrower, unless the voyage be thereby lost.

A ship is captured and detained for a month, recaptured and carried to a port out of the course of the voyage, restored on payment of salvage, and at last arrives at her port of destination: The borrower is not discharged.

Joyce v. Williamson, B. R. Mich. 23 G. III. MS.

Thus:—An action was brought on a bottomry bond, on a voyage from the *Tagus* to *New York*; and the condition of the bond was, that if, upon the ship's arrival at *New York*, the defendant should pay the plaintiff the sum lent, with the stipulated interest; or if the ship should be lost, taken by the enemy, miscarry, or be cast away, the bond to be void, otherwise to remain in force.—The defendant pleaded, 1st. *Non est factum*; 2dly. That the ship did not arrive safe at *New York*; 3dly. That the ship was captured by the enemy.—Issue was joined upon the two first pleas; and to the third the plaintiff replied re-capture. Issue being joined on this replication, it appeared upon the trial, that the ship was taken on her passage to *New York*, detained for a month, and plundered of her stores; that she was then retaken by an *English* privateer, and carried into *Halifax*; where the court of admiralty decreed that she should be restored to the original owners, on payment of salvage, which was

pleaded piracy; and upon demurrer to this plea, it was contended, that robbery is no more an excuse to a master of a ship than to a common carrier: But the court held that piracy was an excuse in this case, being one of the dangers of the seas.

raised

raised by sale of part of the cargo; that after a considerable repair there, she sailed for *New York*, where she arrived with the remainder of her cargo, and earned her freight: That the ship and freight were then worth the sum mentioned in the bond; but not worth that sum, and the sum laid out in repairs.—There was a verdict for the plaintiff, and the court, upon a motion for a new trial, determined that the verdict was right, and the plaintiff entitled to recover.—Lord *Mansfield*, in delivering the opinion of the court, said;—"It is clear that, by the law of *England*, upon a bottomry contract, there is *neither average nor salvage*. It has been contended on the part of the defendant, that this case is within the saving words, that, in case of loss by *capture*, the bond should be void; and that here was a capture and detention for a month. But, upon consideration, we are all of opinion, that a taking, within this condition, does not mean a temporary taking, which is only an obstruction which may last for a day, it must be such a taking as, between insurer and insured, would amount to a *total loss*. But this was not such a capture. The voyage was not lost; for the ship arrived at her port of destination and earned her freight: And as freight depends on the safety of the ship, the ship must have *arrived safe* to have earned her freight. Either way there must be a hardship; but the law allows no average or salvage in bottomry bonds."

No loss will have the effect of avoiding the contract, or discharging the borrower, but a total loss proceeding from the perils of the sea, during the voyage, and within the time specified in the contract. *Creditor subit periculum navigationis in casibus fortuitis tantum (a)*. But no loss shall be reputed to have arisen from the perils of the sea, which arose from the internal defect of the thing hypothecated. As where a ship is not sea-worthy, and perishes from age, rottenness, or other such cause; or

The lender is not liable for loss proceeding from the internal defect of the thing, unless by express stipulation.

(a) *Roccus de navib. n. 51.*

where

where goods perish of themselves, liquors run out through the defect of the casks; dry goods heat and ferment by length of time (*a*), &c. *Valin* (*b*) seems to condemn, as illegal, any clause by which the lender is made liable for loss occasioned by the internal defect of the thing. But *Emerigon* (*c*) holds, that the lender may, by express stipulation, make himself liable for such losses, provided the cause did not exist before the ship's departure.

He is not liable for the act of the owners or master of the ship.

The act of the owners of the ship, of the master, or of the borrower, is not a peril at the risk of the lender. *Qui suscipit in se periculum navigationis, suscipit periculum fortune, non culpæ* (*d*). As if the voyage be changed by order of the owners of the ship; or if a loss happen by the barratry of the master, or by the misconduct of the merchant; this will not discharge the borrower. *Si infortunium vel naufragium, ex culpa debitoris processerit, tunc creditor non tenetur de periculo et damno in quod incurritur, ex culpa vehentis aut alterius* (*e*). This is the general rule; but, by express stipulation, the lender may be made liable for every loss not occasioned by the act of the borrower (*f*).

Nor for a loss by smuggling, unless he was privy to it.

If the ship be forfeited, or the goods confiscated, for smuggling, in which the lender had no concern, he is not liable for the loss; for this does not arise from the perils of the sea, but from the lawless avarice and temerity of the borrower. *Non ex marine tempestatis discrimine, sed expræcipiti avaritiâ, et incivili debitoris audaciâ* (*g*).—Yet it is said, that if the lender was privy, and consenting to the contraband trade in which the money was to be employed, he shall be liable for the loss. *Si sciente, et consentiente illo fiat, consensus jus facit.* (*h*)—In *England*, if the money were lent to be employed in a trade prohibited by law; the contract would be absolutely

(*a*) Ord. de la mar. h. t. art. 12. *Emerig.* t. 2, p. 509. *Pothier*, h. t. n. 34.—(*b*) On art. 12, h. t.—(*c*) Tom. 2, p. 509.—(*d*) ff. de naut. fœn.—(*e*) *Roccus* de navib. n. 51.—(*f*) Vid. *Emerig.* t. 2, p. 510.—(*g*) ff. de naut. fœn. 3.—(*h*) *Kuricke*, tit. 6, p. 762. Vid. *Valin* on art. 12, h. t.

void; and the sum lent could never be recovered from the borrower, even though no loss had happened (a).

The lender, like an insurer, is only answerable for losses which happen within the time and place of the risk, as specified in the contract. Therefore, if the ship deviate from the voyage, without necessity, the lender will not be liable, any more than an insurer, to any loss that may afterwards happen (b). Upon this subject I would refer the reader to the chapter on deviation, in cases of insurance (c), the doctrine of which is equally applicable to the present subject.

Our courts, both of law and equity, have adopted the same principle in several instances.

Thus:—The plaintiff lent 500 l. upon the hull of a ship, and the defendant covenanted to pay, if the ship went from *London* to *Bantam*, and returned from thence directly to *London*, within 12 months, 550 l.; if from *London* to *Bantam*, and from thence to *China* or *Formosa*, and returned to *London* within 24 months, 650 l.; and if she returned not within 24 months, then to pay 5 l. per month above the 650 l., till 36 months; and if she returned not within 36 months, then to pay 710 l., unless it could be proved that the ship was lost within the 36 months.—The ship went from *London* to *Bantam*, and from thence to *Surat* and other parts, and so returned to *Bantam*; and in her voyage from *Bantam* to *London*, was lost within 36 months.—In an action upon the bond; after a series of long and intricate pleadings, the above facts appeared upon demurrer.—The court inclined to think, that, by reason of the deviation in going to *Surat*, the plaintiff was discharged from the risk, and therefore entitled to recover; and after time taken to deliberate, they adjudged accordingly (d).

So, where, to an action upon a bottomry bond, the defendant pleaded, that the ship went from *London* to

If the ship do not sail on the voyage described, or deviate without necessity, the lender will be discharged from the risk.

A ship is lost after a wilful deviation, the lender is not liable.

Western v. Wildy,
Skin. 152.

If the ship be pressed into the King's service, this will excuse a deviation; but if the borrower allege a deviation, this must

(a) Vid. sup. book 1, ch. 3, § 1, 2.—(b) *Pothier*, h. t. n. 18. *Emerig.* t. 2, p. 522.—(c) *Sup.* 392.—(d) *Vid. Anon. 1 Eq. Ca. Abr. 372, 2 Ch. Ca. 130.*

be explicitly denied.

Williams v. Stedman, Skin.
345; *Holt's Rep.*
126. S. C.

Barbadoes, sine deviatione, and afterwards, on her return from *Barbadoes* towards *London*, she was lost *in viagio predicto*: The plaintiff replied, that the ship, in her return, went from *Barbadoes* to *Jamaica*; and that after a stay there, she sailed from *Jamaica* for *London*, and was lost; and so shews a deviation: The defendant rejoined, that she was pressed into the King's service, and so was compelled to go to *Jamaica*, which is the deviation pleaded by the plaintiff; *absque hoc*, that she deviated after she was pressed. Upon demurrer to this rejoinder, the plaintiff had judgment.—The court held that the plea of the defendant was not good; for he alledged that the ship went from *London* to *Barbadoes*, without deviation, and that, in her return from *Barbadoes* to *London*, she was lost *in the voyage aforesaid*; but did not shew, *without deviation*. And as the condition was so in express words, the defendant ought to have shewn expressly that he had performed it according to the words.

Changing the ship without necessity, discharges the lender.

So where money is lent on goods, on board a certain ship, the lender is only considered as liable for the risk on those goods while they are on board that ship; and if they be removed to another ship, without necessity, the lender will be discharged (a).—But if the change be occasioned by any necessity, he will still continue liable. As if the first ship be pressed into the king's service, or be declared unnavigable, &c.; the borrower may load the goods on board another vessel at the risk of the lender, and the increase of freight, &c. will be a general average, to which the lender will be liable (b).

Duration of the risk.

Money is generally lent for the whole voyage, outward and homeward; or for either separately; or for a limited time. The contract usually specifies the commencement and end of the risk; and any misfortune happening before or after, is at the risk of the borrower (c). If the voyage be described in the bond; but

(a) *Pothier*, h. t. n. 18; *Emerig.* t. 2, p. 524.—(b) *Emerig.* ut sup. Vid. sup. book 1, ch. 11, § 2.—(c) Vid. *Valin*, on art. 13, h. t. *Emerig.* t. 2, p. 514.

the time of the commencement and end of the risk be not specified, the risk, as to the ship, shall commence from the time she sets sail, and continue till she anchors in safety at her port of destination; and, as to goods, from the time they are shipped, till they are safely landed (a).

When the loan upon goods is both for the outward and homeward voyages, the lender continues liable to the risk during the homeward voyage on the goods, by which those have been replaced on which the money was lent (b).

(a) Vid. sup. book 1, ch. 6, § 5.—(b) *Pothier*, h. t. n. 34.

C H A P. VI.

Whether the Lender be liable to general Average.

By the general law of merchants, the lender is liable to general average.

THERE is this difference between insurance and bottomry, that an insurer, unless he stipulate to be free of particular average, is always liable to that charge; whereas a lender is not liable to it, unless by express stipulation: But, by the general law of merchants, in case of gross or general average, the lender shall contribute to discharge the borrower (a): The reason of this difference is, that particular average in no degree contributes to the safety of the ship; whereas it is to those sacrifices which are the subject of general average, that the lender owes the preservation of his money, which, without such sacrifices, would be lost with the ship (b).

The nature of the contract seems to require this.

Foreign writers even hold that a stipulation on the part of the lender, to be free of general average, would be absolutely void, as being inconsistent with the nature of the contract, contrary to good policy, and injurious to the interests of the lender himself, who must lose all, if the ship be lost (c). Indeed the nature and object of bottomry contracts, seem, of themselves, to require that

(a) 'L'argent à profit n'est contribuable en aucune avarie, ' réservé qu' aux rachats, compositions, et jets faits pour la ' salvation du total, et pour le soulagement ou l'évasion, des ' dangers.' *Le Guidon*, ch. 19, art. 5.—'Ce qui est fort juste,' says *Cleirac* in his commentary on this passage, ' afin que cette ' grosse usure passe au paroisse, Pensatio vel *aquamentum periculi*, ' comme dit *Du Moulin* sur la loi *periculi pretium*. *Dig. De nautico ' sanore*, en son traité, *Contrat. usur.* quæst. 3 de *trajeçitiis*. ' L'argent a profit ne charge pas le navire mais l'affecte par hypo- ' thèque, laquelle ne subsiste que par la salvation d'iceluy; c'est ' quoy il est raisonnable que la dite hypothèque contribuë à ce ' qui concerne la conservation du total, ou de son sujet, *Ut om- ' nium in tribuione sarcitur quod pro omnibus datum est*.' *Vid. Pothier*, h. t. n. 42, 47.—(b) *Emerig.* t. 2, p. 505.—(c) Consult on this point *Vulân*, on art. 16, h. t.; *Pothier*, n. 46; *Emerig.* t. 2, p. 505.

the lender shall be liable for general average. The borrower generally takes up the money because he has not a capital of his own upon which he can carry on his trade. Knowing that it would be impossible for him to repay the sum borrowed, but in the event of a fortunate return, he means to run no risk, and agrees to part with a large share of his profits, to be free from all personal responsibility. But if he should be held liable to general average, then, by taking up money in this way, he must engage in a game of hazard, perhaps without being aware of his danger, in which he may eventually be ruined.

It has been said, however, by a very distinguished judge, that, "*by the law of England, there is neither average nor salvage upon bottomry contracts (a).*" And this doctrine, so far as it relates to average, has been since adopted by another noble person, no less eminent for his learning and abilities (b). I have anxiously sought, however, but sought in vain, to find any decided case, or authority in the law, which could warrant this doctrine.—I cannot agree with a learned writer (c) on this subject, that the stat. 19 G. II. c. 37, § 5 (d), which provides that the benefit of salvage shall be allowed to the lender, on *East India* voyages, conclusively proves that there was neither average nor salvage upon bottomry contracts at common law.—I never could look upon that act as having introduced any new principle into the law either of insurance or bottomry contracts. On the contrary, it seems to me, after the best consideration I have been able to give the subject, that it merely restored them to their original and only proper use, from which a spirit of gaming had been suffered to pervert them. I cannot even admit that, because the statute gives the benefit of salvage to the lender upon *East India* voyages, therefore he was not entitled to this at common law. As well might it be said, that because the insurance of enemy's property, in time of war,

Whether by the
law of England.

(a) Per Lord Mansfield in *Joyce v. Williamson*, sup. 652.—

(b) Per Lord Kenyon at N. P. in *Walpole v. Ewer*, inf. 660.—

(c) *Park*, 423.—(d) Sup. 104.

has been occasionally prohibited by statute, therefore the insurance of enemy's property is a legal contract at common law (a).—But even admitting the inference, that because the statute gives the *benefit of salvage* to the lender upon *East India* voyages, therefore he was not entitled to this at common law; does it from thence follow that he was not liable to *general average* at common law? The statute no where mentions general average.

If the insured upon a respondentia interest on a foreign ship be obliged to contribute to a general average, the underwriters will be liable.

But whatever may be the true rule of law which ought to prevail on this subject, it has been determined, that if an insurance be made in *England* upon a respondentia interest upon a *foreign ship*, and it appear that the lender is liable by the law of the country to which the ship belongs, to contribute to a general average; the underwriters upon the policy will be liable for such contribution.

Walpole v. Ewer,
at N. P. after
Tr. 1789, *Park*
423.

Thus:—Where a respondentia loan on a *Danish* ship and goods was insured in *England*, and an average loss was sustained upon the goods to the amount of 6l. 15 s. *per cent.* to which the holder of the respondentia bond was obliged to contribute. He brought his action against the *English* underwriters to recover the amount of this contribution.—Lord *Kenyon*, who tried the cause, said,—“By the law of *England*, a lender upon respondentia is not liable to average losses; but is entitled to receive the whole sum advanced, provided the ship and cargo arrive at the port of destination. The plaintiff contends that as, by the law of *Denmark*, such lenders are bound to contribute to average losses, according to the amount of their interest, the insurer here must answer to them. The *Danish* consul has proved that he received a judgment of the court of *Copenhagen*, the decretal part of which proves the law of *Denmark* to be as the plaintiff has stated it. The opinions of several men of eminence in that country have been offered on each side: But I reject them, because the solemn decision of a court of competent jurisdiction is of much greater weight than the

The decision of a foreign court of competent jurisdiction is the best evidence to shew what the law of the country is.

(a) See this subject fully considered, sup. book 1, ch. 2, § 1. opinions

opinions of advocates, however eminent, or even the extrajudicial opinions of the most able judges. It seems as if, in this case, the underwriters were bound by the law of the country, to which the contract relates."—The jury found a verdict for the plaintiff (a).

(a) Vid. the case of *Newman v. Cazalet*, *Beaver* lex merc. 349, where an insured had been obliged by the judgment of a foreign court to pay a larger average contribution than by the law of *England* could have been demanded, but it appeared to have been customary in adjusting losses to allow the whole of such contributions; Mr. Justice *Buller* at N. P. ruled that if the usage were clearly proved, it ought to govern.

C H A P. VII.

Whether the Lender be entitled to the Benefit of Salvage.

The stat. 19 G. II. c. 37, gives the benefit of salvage to lenders on *East India* voyages.

THE provision of the stat. 19 G. II. c. 37, which gives the benefit of salvage to lenders on bottomry and respondentia, being confined to *East India* voyages, it may be proper here to enquire, whether, before that act, the lender, upon any voyage, was entitled to the benefit of salvage.

Whether the lender on other voyages be entitled to the same benefit.

By the general law of merchants, the event upon which the borrower is discharged, is the total loss of the ship or goods upon which the money is lent; provided this happen by the perils mentioned in the contract. Though the borrower is bound to pay the sum lent and the marine interest, in case the ship or goods on which the money is lent arrive at the port of destination, however damaged or reduced in value by the perils of the sea; yet if part should be captured or lost, the borrower is only bound to pay in proportion to what remains (a).—Thus, if 1000 l. be lent on goods, the half of which are lost, the rest saved, the lender will lose 500 l. of his principal, and the borrower will pay the remaining 500 l. with the marine interest upon that sum. If the ship be lost, but the goods on which the money was lent are all saved, the contract will remain in force, and the borrower will be liable, provided another ship can be procured to convey the goods to the place of their destination. But the charge of the other vessel will be at the expence of the lender, and if no other can be procured, the borrower will be discharged on accounting to the lender for the proceeds of the goods saved.

(a) *Pothier*, h. t. n. 47; *Valin*, art. 11, 14, 17, h. t. *Emerig.* t. 2, p. 453. Consult on this point *Bynk.* quest. jur. priv. lib. 3, c. 16.

But,

But, by the law of *England*, according to the opinion of Lord *Mansfield*, which we have already had occasion to refer to (a), *there is neither average nor salvage upon bottomry contracts*: It must be admitted, however, that, without the benefit of salvage, this contract must partake greatly of the nature of a wager, even when the money is lent upon goods on board of equal value. If there be a total loss of the ship the lender loses all, though all the goods are saved.

Lord *Mansfield's*
opinion against
it.

(a) Sup. 659.

As to the insurance of bottomry and respondentia loans,
vid. sup. 93, 94, 95, 223, 225.

As to the remedy of the lender, where the borrower becomes bankrupt, before the risk is ended, and the lender entitled to repayment, vid. sup. 631.

BOOK THE THIRD.

Of Insurance upon Lives.

C H A P. I.

Of the Nature of this Contract.

Defined.

THE insurance of a life is a contract whereby the insurer, in consideration of a certain premium, either in a gross sum, or by annual payments, undertakes to pay the person for whose benefit the insurance is made, a stipulated sum of money, or an annuity equivalent, upon the death of the person whose life is insured, *whenever this shall happen*, if the insurance be for the whole life, or *in case this shall happen within a certain period*, if the insurance be for a limited time.

Utility of it.

The precarious dependence of a numerous family upon the life of a single person, naturally suggests the idea of seeking some protection against a calamity, which sooner or later must befall them; and this, probably, suggested the first idea of insurances upon lives, as an expedient by which a pecuniary indemnity, at least, might be secured to the sufferers, sufficient to rescue them from the poverty and distress with which they were threatened.

Upon this principle rests the utility of insurances upon lives. Persons having incomes determinable upon their own lives, or the lives of others, arising from landed property, from church livings, from public employments, pensions, annuities, &c. by paying such an annual premium as they can spare from their present necessities, may secure to their widows, their children, or other dependants, an adequate sum of money, or an equivalent annuity, payable upon their deaths. By such insurances, also, may the fines to be paid upon the renewal of leases, or upon the descent of copyholds, be provided for. So, where

where a person, having only a life income, wants to borrow money, but can only give his own personal security for it; he may, by insuring his life, secure to the lender the repayment of his money, though he should die before he is enabled to discharge the debt (a).

These considerations induced the Bishop of *Oxford* and several other benevolent persons in the reign of *Queen Ann*, to apply for the charter by which the corporation, called the *Amicable Society*, was established; to enable persons to subscribe a part of their incomes, in order that the representative of each subscriber should, upon his death, receive such a sum as the funds of the corporation would enable them to pay upon the several deaths happening in each year.

Establishment of the different companies for the insurance of lives.
Amicable Society.

But as the benefits of this society were confined to a limited number of subscribers, and those only for small sums, several other corporations and companies upon more extensive plans have been established.—The *Royal Exchange* and *London Assurance* companies obtained charters from king *George I.* to enable them to make insurances upon lives. The Society for *Equitable Assurances* on lives and survivorships, was established in the year 1762, by deed enrolled in the court of King's Bench at *Westminster*, in which every person who insures becomes a member, participating in the profit and loss of the society. The success attending this establishment has given rise to two others, namely, the *Westminster Society*, for insurance on lives and survivorships, and granting annuities; and the *Pelican* life insurance company.

Royal Exchange and *London Assurance* companies.

Equitable Assurance.

Westminster Society.
Pelican Company.

Legality of insurance on lives.

We are not informed at what time this species of insurance was first introduced into this country; probably because it came into use by slow and imperceptible degrees. *Roccus* (b) has taken some pains to prove that insurances upon lives are legal contracts. Yet in most of the states of *Europe* such insurances have been prohibited by positive law. In this country, however, such contracts have been repeatedly sanctioned by legislative authority,

(a) Vid. inf. ch. 3.—(b) De assicur. n. 74.

and indeed the legality of them is now indisputable. Perhaps it is in this country alone, that insurances upon lives can be safely tolerated. In *France*, they have always been deemed illegal (*a*), and they are expressly prohibited by the ordinance of 1681 (*b*), because, say the *French* writers, it is an offence against public decency to set a price upon the life of man, particularly the life of a freeman, which is above all valuation (*c*).

(*a*) *Le Guidon*, ch. 16, art. 5.—(*b*) *Tit. des assurances*, art. 10.—(*c*) *Valin*, on art. 10. *tit. des assurances*. *Vid. sup.* 132; *Pothier*, *tit. des assurances*, n. 127.

C H A P. II.

Of the Warranty of the Health and Age of the Life insured.

IT is generally a condition or warranty in insurances upon lives, either inserted in the policy, or contained in a declaration or agreement signed by the insured, that the person whose life is meant to be insured has not any disorder which tends to the shortening of life; that he has, or has not, had the small pox; and that his age does not exceed so many years; that this declaration shall be the basis of the contract between the insurers and the insured; and that, if any untrue averment be contained therein, the contract shall be void, and all money paid on account of the insurance forfeited.

The declaration signed by the insured.

As this declaration is to be taken as part of the written contract (a), amounting to a warranty, it behoves every person who makes an insurance upon a life, to be very circumspect in ascertaining the truth of the allegations contained in it; because upon that the validity of the contract must depend.

By the warranty that the person, whose life is to be insured, *has no disorder which tends to the shortening of life*, is not to be understood that he is perfectly free from the seeds of all disorder. The warranty is sufficiently true if he be in a reasonably good state of health, and, that his life may be insured on the common terms, for a person of his age and condition: And the following case will shew, that though the person labours under a particular infirmity, yet, if it can be shewn that this had no tendency to shorten life, and that, in fact, it did not, in

A warranty that the party is in good health, will not be falsified by proving that he laboured under a particular infirmity; if this had no tendency to shorten life.

(a) See the case of *Routledge v. Burrell*, inf. book 4, c. 4.

any degree, contribute to his death, the warranty is sufficiently complied with.

The life insured is warranted in good health at the time of making the policy:—It will not falsify the warranty, to prove that, in consequence of a wound, he had a partial palsy in his loins; if this did not tend to shorten life.

*Ross v. Brad-
shaw, 1 Bl. 312.*

Thus:—An insurance was made on the life of Sir *James Ross* for one year, from *October 1759* to *October 1760*; warranted in good health at the time of making the policy.—In an action on this policy, it appeared upon the trial, that Sir *James* had received a wound at the battle of *La Feldt*, in the year 1747, in his loins, which had occasioned a partial relaxation or palsy, so that he could not retain his urine or *feces*, and which was not mentioned to the insurer. Sir *James* died of a *malignant fever* within the time of the insurance. All the physicians and surgeons who were examined for the plaintiff, swore that the wound had no sort of connexion with the fever; and that the want of retention was not a disorder which shortened life; but he might, notwithstanding that, have lived to the common age of man; and the surgeons who opened him said that his intestines were all sound. One physician, who was examined for the defendant said, that the want of retention was paralytic; but being asked to explain, he said it was only a local palsy, arising from the wound, but did not affect life: But, on the whole, he did not look upon him as a good life.—Lord *Mansfield*, who tried the cause, in summing up the evidence to the jury said;—"No question of fraud can exist in this case. When a man makes an insurance upon a life generally, without any warranty of the state of the life insured, the insurers take all the risk, unless some fraud be committed by the person insuring, either by *suppressing some circumstances, which he knew*, or by *alleging what was false*. But if the insured knew no more than the insurer, the latter takes the risk. Wherever there is a warranty, it must, at all events, be proved that the party was a good life, which makes the question on a warranty much larger than on fraud. Here there was a warranty, and it is proved that there was no representation at all, as to the state of life, nor any question asked about it: Nor was it necessary. Where an insurance is upon a *representation*, every material circumstance

cumstance should be mentioned; such as age, way of life, &c. But where there is a warranty, then, nothing need be told; but it must, in general, be proved, if litigated, *that the life was, in fact, a good one: And so it may be, though he had a particular infirmity.* The only question is, whether he was in a *reasonable good state of health, and such a life as ought to be insured on common terms.*"—The jury, upon this direction, without going out of court, found a verdict for the plaintiff.

So, where an insurance was made on the life of Sir *Simeon Stuart*, from the 1st of *April 1779*, to the 1st of *April, 1780*, and during the life of *Eliza Edgley Ewer*. The policy contained a warranty that Sir *Simeon* was about 57 years of age, and in good health when the policy was underwritten, and that Mrs. *Ewer* was about 78 years of age. Upon the trial of the cause, the defendant admitted that Sir *Simeon* and Mrs. *Ewer* were of the respective ages mentioned in the warranty; that he died before the 1st of *April 1780*, and that she was living. Two questions were intended to have been made; 1st. As to the plaintiff's interest; 2dly. On the warranty of health. The former was disposed of by the plaintiff's proving a judgment debt.—As to the latter, it appeared in evidence that, though Sir *Simeon* was troubled with spasms and cramps, from violent fits of the gout, he was in as good a state of health when that policy was underwritten, as he had enjoyed for a long time before. It was also proved by the broker who effected the policy, that the underwriters were told that Sir *Simeon* was subject to the gout.—Doctor *Heberdin*, and other gentlemen of the faculty proved that spasms and convulsions were symptoms incident to the gout.—Lord *Mansfield*, who tried the cause, said;—"The imperfection of language is such, that we have not words for every different idea; and the real intention of the parties must be found out by the subject matter. By the present policy, the life is warranted, to some of the underwriters *in health*; to others, *in good health*; and yet there was no difference, in point of fact: *Such a warranty can never mean, that*

Nor will it falsify this warranty to shew that the party was troubled with spasms and cramps, from violent fits of the gout.

Willis v. Poole,
at N. P. after
Eas. 1780.

a man has not in him the seeds of some disorder. We are all born with the seeds of mortality in us. A man, subject to the gout, is a life capable of being insured (a), if he has no sickness at the time, to make it an unequal contract."—There was a verdict for the plaintiff.

If there be no warranty, the insurer takes the risk upon himself; unless there be fraud. The insured refuses to warrant, but the broker tells the first underwriter, that, from the account he had received, he believed it to be a good life.—There being no fraud in this, the underwriters run all risks.

Stackpool v. Simon, at N. P. Hil. Vac. 1779. *Park* 437.

Every subsequent underwriter may give in evidence any representation made to the first.

When there is no warranty, the insurer takes the risk upon himself, whatever may be the state of health of the person whose life is insured, unless there be some fraudulent misrepresentation or concealment.

Thus:—An insurance was made on the life of *Drury Sheppey*, from the 1st of *April* 1777, to the 1st of *April* 1778.—In an action on the policy, the question was, as to the representation of *Sheppey's* health, at the time the policy was effected. The interest in the life was a debt of 900 l. due from *Sheppey* to the plaintiff. It appeared that *Sheppey*, who had a place in the custom-house of *Ireland*, went to the south of *France*, for the benefit of his health, or to avoid his creditors, and there died within the time limited in the policy. The broker, who effected the policy, told the underwriters, that the gentleman for whom he acted would not warrant any thing; but from the account he (the broker) had received, he believed it to be a good life.—Lord *Mansfield*, who tried the cause, said;—"As to the interest, this policy may be considered as a collateral security for the debt due to the plaintiff. When there is no warranty, the underwriter runs the risk of its being a good life or not. If there be a concealment of any knowledge of the state of the life, it is a fraud. It is a rule that every subsequent underwriter gives credit to the representation made to the first (b); and it is allowed that any subsequent un-

(a) It is now a practice, in most of the offices for insurances upon lives, to require that, in the proposal for every insurance, it shall be stated, whether the person, whose life is to be insured, has ever been afflicted with the gout.—(b) *Vid. sup.* 338.

derwriter may give in evidence a misrepresentation to the first. The broker here does not pretend to any knowledge of his own, but speaks from *information* (a). There is no fraud in him.—The jury found a verdict for the plaintiff.

(a) It is not stated, in the above note, from what information he spoke; but if it had appeared that he spoke without any information on the subject, this, I conceive, would have been a misrepresentation that would have avoided the contract. Vid. sup. 335.

CHAP. III.

Of the Interest of the Insured in the Life insured.

Necessity of prohibiting insurances upon lives, without interest.

THE spirit of gaming, which is always ready to insinuate itself into every transaction, and to assume the form of every contract, which depends upon uncertain events, long since availed itself of insurance upon lives, as affording abundant opportunities for speculating upon chances. Wagers came to be daily made upon the duration of men's lives, in the form of insurances, by persons who were neither connected with the parties, nor in any manner interested in the duration of their lives; nor did the insurers much concern themselves to know upon what interest, or for what reason, such insurances were made. Such practices were big with mischiefs of various descriptions; nor is it probable that even the lives, thus presumptuously insured, were always free from danger. The evil, however, at length became apparent to the legislature: But it being admitted, that insurances upon lives, under proper restrictions, might, in many instances, be highly beneficial to the public, it was determined, that such insurances ought not to be abolished, but only regulated.

By 14 G. III., c. 48, § 1. Any insurance made on any life, or other event, wherein the insured shall have no interest, shall be void.

Therefore, by stat. 14 G. III, c. 48, § 1., it is enacted, ' That no insurance shall be made by any person
' or persons, bodies politic or corporate, *on the life or*
' *lives* of any person or persons, or *on any other event or*
' *events whatever (a)*, wherein the person or persons, for
' whose

(a) The title of this statute is, ' An act for regulating
' *insurances upon lives*, and for prohibiting all *such insurances*,
' *except* in cases where the persons insuring shall have an in-
' *terest*

‘ whose use or benefit, or on whose account, such policy or policies shall be made, *shall have no interest, or by way of gaming or wagering*: And that every insurance made contrary to the true intent and meaning of this act, shall be null and void to all intents and purposes whatsoever.’

And (by § 2), it is further enacted, ‘ That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events; without inserting in such policy or policies, the name or names of the person or persons interested therein, or for what use, benefit, or on whose account, such policy is so made or underwrote.’

And, (by § 2), the name of the person interested in the event shall be inserted in the policy.

And (by § 3,) it is further enacted, ‘ That in all cases, where the insured hath an interest in such life or lives, event or events, no greater sum shall be recovered, or received from the insurer or insurers, than the *amount or value* of the interest of the insured in such life or lives, or other event or events.’

And, (by § 3), the insured shall recover no more than the *amount or value* of his interest.

The fourth section contains a proviso that this act shall not extend to insurances *bond fide* made on ships or goods.

This act not to extend to marine insurances.

Very few questions have arisen upon the interest of the insured, in the life insured.—A *bond fide* creditor has undoubtedly an interest in the life of his debtor, at least where he has only the personal security of the debtor; and it has been holden by a great authority, that this interest is insurable within the statute.

A creditor has an insurable interest in the life of his debtor.

Thus:—An insurance was made on the life of Lord *Newhaven*, from the 1st of *December* 1792, to the 1st of

Anderson v. Esir, at N. P. B. R. Hil. 1795. Park 432.

‘ tereft in the life or death of the persons insured.’—From this title it would seem, that the framers of this bill originally intended to confine the operation of it to insurances upon lives only. But the words, ‘ *or any other event or events whatsoever*, introduced both into the enacting parts and the preamble, plainly shew that the legislature meant, that the regulations of this act should extend to every species of insurance, except marine insurances; to which, by the proviso in the 4th section, it is declared, that it shall not extend.

December 1793.—In an action on the policy, the only question made by the defendant was, as to the plaintiff's interest in the life insured, which, it was contended, was not sufficient to take this case out of the above statute. It appeared in evidence, that Lord *Newbaven* was indebted to the plaintiff and a Mr. *Mitchell*, in a large sum of money; part of which debt had been assigned by them to another person; the remainder being more than the amount of the sum insured, was, upon a settlement of accounts between the plaintiff and *Mitchell*, agreed by them to remain to the account of *Mitchell* only.—Lord *Kenyon*, who tried the cause, was of opinion, that this debt was a sufficient interest. He said it was singular that this question had never been directly decided before: That a creditor had certainly an interest in the life of his debtor; because the means by which he was to be satisfied might materially depend upon it; and that, at all events, the death must, in all cases, in some degree, lessen the security.—The jury found a verdict for the plaintiff.

Whether this ought not to be confined to the case where, by the death of the debtor, the creditor must lose his debt.

From the above note of this case, though it seems to be rather a defective one, it may reasonably be supposed that the plaintiff had only Lord *Newbaven*'s personal security for the debt, and that with him died all hopes of repayment from his estate. Upon this ground I think there could be no doubt but that the creditor had an insurable interest in Lord *Newbaven*'s life, to the amount of the debt. But Lord *Kenyon* is stated to have said, that, "*At all events, the death must, in all cases, in some degree, lessen the security.*"—As an abstract proposition, this is, in general, true. But it cannot be inferred from this, that his lordship meant to lay it down, as law, that every creditor, however his debt may be secured, has an insurable interest in the life of his debtor, to the amount of the debt. Lord *Mansfield*, in the case of *Stackpole v. Simon (a)*, says that a policy may be considered as a col-

(a) Sup. 671.

lateral security for the debt due to the insured.—And yet it would seem, that, even where the creditor has only the personal security of the debtor to rely upon for repayment, the insurer, before he pays the sum insured, might, perhaps, have a right to call upon the creditor insured, to shew that nothing could be recovered from the estate of the deceased debtor. Where the debt is amply and satisfactorily secured by mortgage or otherwise, the creditor can have but the shadow of an interest in the life of the debtor. But, by the third section of the above act, it is declared, that, ‘No greater sum shall be recovered from the insurer than the amount or value of the interest of the insured in the life insured.’—Now, what can be the amount or value of the interest of the creditor, in the case put?—Surely nothing that a jury could estimate.

Be this, however, as it may, no creditor has an insurable interest in the life of his debtor, unless the debt be incurred upon a good and legal consideration. Therefore, in the following case, it was ruled, that the holder of a note given for money won at play, has not an insurable interest in the life of the maker of the note.

An action was brought on a policy on the life of *James Russell*, from the first of *June 1784* to the first of *June 1785*.—By a memorandum at the foot of the policy it was declared, that it was intended to cover the sum of 5000*l.* due from *Russell* to the plaintiff, for which he had given his note, payable in one year from the 14th of *May 1784*.—Two objections were made on the part of the defendant; 1st. That part of the consideration for the note, was money won at play; 2dly. That *Russell*, at the time he gave the note, was an infant.—Mr. Justice *Buller*, who tried the cause, nonsuited the plaintiff, upon the ground that part of the consideration for the note, being for a gaming transaction, there was a want of interest in the plaintiff. But as to the objection of the infancy of *Russell*, he said, that the interest was contingent; for *Russell* might or might not have avoided the note; and he doubted much whether, till so avoided, the note must not be taken, as against a third person, to be the note

The holder of a note for money won at play has not an insurable interest in the life of the maker.

Dwyer v. Edie, at N. P. after Hil. 1788. *Park* 432.

The infancy of the debtor cannot be objected by an insurer.

of a person of full age ; and the maker of the note only could take the objection.

A trustee may insure for the benefit of the *cestui que trust*.

Tidswell v. Angerstein, Peake 151.

A trustee may insure for the benefit of the *cestui que trust*.—As where an insurance was made on the life of one *Holden*, from the 17th of *August* 1790, to the 17th of *August* 1791, and during the life of the plaintiff. *Holden* had granted an annuity to the plaintiff's late brother, which annuity he had bequeathed to persons not parties to this insurance, having made the plaintiff executor of his will, and directed him to make insurance.—In an action on this policy, brought by the executor, it was objected that, as the annuity was not devised to him by the grantee, he had no insurable interest in the life of *Holden* the grantor.—But Lord *Kenyon* thought this a sufficient interest in the executor to support the action.

CHAP. IV.

Of the Risks which Insurers upon Lives are to run.

AS, by the terms of this contract, the entire sum insured is to be paid upon the happening of one single event, which cannot *partially* happen, and by the happening of which, the insured must suffer all the injury against which he meant to be protected by the insurance, the loss must always be total, and never can be partial.

A loss, upon this contract, must always be total.

The different insurance companies annex to the contract certain conditions or exceptions.

What are the usual exceptions.

The *Royal Exchange Assurance* declares every insurance made by a person *on his own life* to be void, if the person, whose life is insured, shall depart the limits of *Europe*, shall die upon the seas, or enter into any military or naval service whatsoever, without the previous consent of the company; or shall die by suicide, duelling, or the hand of justice.

Where the insurance is made by a person, *on the life of another*, death "*by suicide, duelling, or the hand of justice*" is not excepted.

The *Westminster Society* adopts the same exceptions. The *Equitable Assurance*, and the *Pelican Life-Insurance*, adopt the same exceptions, only omitting the word *duelling*, even where the party insures his own life.

We have already seen that, in the case of marine insurances, not only the *cause* of the loss, but the loss itself, must appear to have happened during the continuance of the risk (a). The same principle applies to insurances

To make the insurer liable, not merely the *cause* of the death, but the death itself must appear to have happened *within the time limited*.

(a) *R. Lockyer v. Offley*, 1 T. R. 252, sup. 174, 459.

upon lives. And therefore, if a man's life be insured for a year, and some short time before the expiration of the term, he receive a mortal wound, of which he dies *after the year*, the insurer would not be liable (a).

But whether the death happened within the time limited, is always a question of fact.

Patterson v. Black, at N. P. Hil. Vac. 1780.

But where it is uncertain whether the death happened within the time limited, this is a question of fact that must be left to the decision of a jury.

Thus:—An insurance was made on the life of *L. Maclean* Esq. from the 30th of *January* 1772 to the 30th of *January* 1778. In an action on the policy, it appeared, that, about the 28th of *November* 1777, he sailed from the *Cape of Good Hope*, in the *Swallow* sloop of war; which ship, not being afterwards heard of, was supposed to have been lost in a storm off the *Western Islands*.—The question was, whether *Maclean* died before the 30th of *January* 1778. To establish the affirmative of that question, the plaintiff called witnesses to prove the ship's departure from the *Cape* with *Maclean*; and several captains swore that they sailed the same day; that the *Swallow* must have been as forward in her course as they were on the 13th or 14th of *January*, the period of a most violent storm, in which she probably was lost; and that the *Swallow* was much smaller than their vessels, which, with difficulty, weathered the storm.—Lord *Mansfield*, who tried the cause, left it to the jury to say, whether, under all the circumstances, they thought the evidence sufficient to convince them that *Maclean* died before the time limited in the policy; adding, that if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have their verdict.—They found for the plaintiff.

If a policy be to take effect from the day of the date, the day of the date is excluded.

Sir *Robert Howard* and *Salk*, 2 Salk. 625, 1 Ld. Ray. 430.

A question which has often puzzled lawyers, namely; whether a period of time, to commence from the day of the date, was inclusive or exclusive of that day, once occurred in an action upon a policy upon the life of Sir *Robert Howard*, for one year, from the day of the date thereof,

(a) Per *Willes*, J. in delivering the opinion of the court in *Lockyer v. Osley*, 1 T. R. 254.

which

which was the 3d day of *September* 1697. Sir Robert died on the 3d of *September* 1698, at one o'clock in the morning.—Lord C. J. Holt held that, *from the day of the date* excludes the day; but *from the date* includes it; and therefore, the day of the date being excluded in this case, the insurer was held liable (a).

I have now gone through all that seemed to be material upon the subject of insurance upon lives; from which it appears that many of the principles which govern marine insurances are also applicable to this contract. Considering the great multiplicity of insurances which have of late years been made upon lives, the number of litigated cases that have arisen upon them is extremely small. One principal reason is, that the happening of the event insured against is always a fact of easy proof, which can scarcely ever afford any subject of dispute. Another is the great difficulty of practising any fraud in such insurances. But to no cause is this fortunate circumstance more to be ascribed than to the honour, integrity, and liberality of the several companies engaged in this branch of insurance.

Reasons why so few litigated questions have arisen in insurances upon lives.

(a) See the case of *Pugh v. the Duke of Leeds, Cowp. 714*, in which, after great deliberation, it was held that the words *from the date*, and *from the day of the date*, mean the same thing; and that they are taken to be either inclusive, or exclusive, according to the context, and subject matter; and that either meaning shall be adopted which shall most effectually support, not defeat, the intention of the parties.—This may be a very good rule, in the cases to which it applies: But it would have been of no use in the decision of the case above cited; because the intention of the parties, in that case, could only be collected from the policy; and whether they meant to include, or exclude, the day of the date, depended on the construction of the words contained in it. If, therefore, such a case were again to occur, it must be decided whether the day of the date should be excluded or included; and then, perhaps, Lord Holt's opinion might be thought the best authority upon that point.—Such a question, however, is not again likely to arise; because it is now the usual practice to mention the day both of the commencement and end of the policy, and to declare both to be inclusive.

Return of premium.

As to return of premium, no question upon that subject has ever yet, as far as I have been able to learn, occurred in any case of insurance upon lives. If such a question should arise, it must be governed by the same principles which prevail upon that subject in marine insurances. These will be found under the proper head in the first book (a). Indeed Lord *Mansfield*, on two occasions, exemplified his doctrine, upon the subject of return of premium, by shewing their application to the case of an insurance upon a life (b).

Remedy against the estate of a bankrupt insurer.

With respect to the claim which the insured upon a life shall have upon the estate of the insurer, become bankrupt during the continuance of the life insured; this has been determined to be the same as in the case of marine insurances (c).

(a) See book I, ch. 16, § 2.—(b) See his judgment in *Bermon v. Woodbridge*, sup. 573, and in *Tyrie v. Fletcher*, sup. 576.—(c) See the case of *Cox v. Leotard*, Doug. 166, n. sup. 631.

BOOK THE FOURTH.

Of Insurance against Fire.

CHAP. I.

Preliminary Observations.

BY this contract the insurer, in consideration of a certain premium received by him, either in a gross sum, or by annual payments, undertakes to indemnify the insured against all loss or damage which he may sustain in his houses or other buildings, goods and merchandize, by fire, during a limited period of time.

Insurance against fire defined.

I have not been able to ascertain the period of the introduction of insurance against fire into this country. But it has certainly been in use here considerably more than a century. Of late years, notwithstanding a very heavy stamp duty imposed on these insurances, they have been brought into very general use, I might almost have said universal use, in this country; particularly in *London* and other cities and large towns.

The time of its introduction into *England* unknown.

I do not find, however, that this species of insurance is much in use in other countries. It was not till the year 1754 that it came into use at *Paris*. In that year, one of the companies instituted there for marine insurances, obtained from the government permission to make insurances against fire. But they have never, as *Pothier* informs us, become general even at *Paris* (a). In *Holland*, though insurance against fire is not altogether unknown, few people seek its protection; perhaps because the people of that

Very little in use in other countries.

(a) Vid. *Pothier*, tit. *des assurances*, n. 3.

country, can rely so much on their own caution, that they think it unnecessary to pay for any greater security. Indeed I have heard it confidently asserted, by persons well acquainted with the cities both of *London* and *Amsterdam*, that after making all fair allowances, there is, upon an average, more property destroyed by fire in the former in one year, than in the latter in seven.

Whether in a national point of view it be more hurtful than beneficial.

The objection to it.

It cannot be denied that this species of insurance affords great comfort to individuals, and often preserves whole families from poverty and ruin. And yet it has been much doubted, by wise and intelligent persons, whether, in a general and national point of view, the benefits resulting from it are not more than counterbalanced by the mischiefs it occasions. Not to mention the carelessness and inattention which security naturally creates; every person who has any concern in any of the fire offices, or who has attended the courts of *Westminster* for any length of time, must own, that insurance has been the original cause of many fires in *London*, with all their train of mischievous consequences.

More than counterbalanced by its benefits.

On the other hand, the advocates for this species of insurance, though they admit it to have been sometimes the cause of intentional fires; yet they insist, that, even as a national concern, the benefits vastly outweigh the mischiefs which proceed from it. And when we recollect the precautions used by the different insurance companies, to prevent the spreading of fires, by providing a number of fire engines, which are kept in constant repair, and fit for immediate use, not only in all parts of the metropolis, but in every other considerable town in the kingdom;—by keeping in constant pay, a number of engineers and fire-men, expert in extinguishing fires, and porters for the removal of goods;—by employing a number of these in patrolling the streets at all hours of the night, in constant readiness to fly to the spot from whence any alarm of fire may proceed: When we recollect that the courage, promptitude, and address of these people often stop the progress of the most dangerous fires, and thereby rescue many valuable lives, and immense property from

from destruction:—When these benefits, I say, are fairly considered, it is impossible to deny that they greatly outweigh all the disadvantages that can be put in the opposite scale.

A considerable number of companies have been established in *London* and other parts of the kingdom for insurances against fire. Of these some are called *Contribution Societies*, in which every person insured becomes a member or proprietor, participating in profit and loss. Such are the *Hand in Hand*, and the *Westminster* fire-offices, for the insurance of houses and other buildings; and the *Union* fire-office, for insurance of goods. The other companies insure both houses and goods, at their own risk. Of these the principle are the *London* and *Royal Exchange* assurance corporations, the *Sun*, the *Phoenix*, and the *British* fire-offices.

The several fire insurance companies in *London*.

As to the duties, to which this contract is liable, the stat. 37 G. III. c. 90, § 23, repeals all the former stamp duties imposed on policies of insurance against fire; and, (by sect. 24), imposes on every policy, in lieu thereof, a new duty of *three shillings* where the sum insured is under 1000 l. and of *six shillings* where the sum insured amounts to 1000 l. or upwards.

Policies against fire are subject to a stamp of 3 s. if under 1000 l. and of 6 s. if 1000 l. or upwards.—

And, by the same act (sect. 19), the yearly sum of *sixpence*, over and above the yearly sum of *one shilling and sixpence*, already imposed for every 100 l. and so in proportion for any less sum insured, is laid on every policy for insuring houses, furniture, goods, wares, and merchandize, or other property, from loss by fire.

Also to a yearly duty of 2 s. per cent. on the sum insured.

C H A P. II.

Of the Interest of the Insured.

Whether an insurance against fire without interest be void at common law.

I DO not find that it has ever been a practice to make insurances against fire, avowedly without interest. The effect of such insurance would, I think, afford a powerful argument against the legality of any insurance without interest, at common law. If a wager insurance be good, at common law, I do not know that it must necessarily assume the form of any particular species of insurance: But if the question, whether a wager policy be a legal contract at common law, were to arise in the case of an insurance against fire, it is impossible to suppose that the judges could ever be prevailed upon to sanction, by their authority, a contract of so mischievous a tendency.—Lord Chancellor *King*, in the case of *Lynch v. Dalzell*, which we shall presently have occasion to cite at large, says;—"The party insuring must have a property at the time of the loss, or he can sustain no loss, and consequently can be entitled to no satisfaction." And Lord *Hardwicke*, in the case of the *Sadler's Company v. Badcock* (a), lays it down as law, that the insured must have an interest or property at the time of insuring, and at the time the loss happens. So that, according to these two great authorities, it is clear that an insurance against fire, without interest, would have been void at common law. But if any doubt remained upon that question, it has been removed by the stat. 14 G. III. c. 48. That act, though it is entitled, an act for regulating *insurances upon lives*, yet, by the enacting clause, (sect. 1.) (b), it

Since the stat. 14 G. III. c. 48, it would be clearly void.

(a) Inf. 700.—(b) Sup. 672.

prohibits all insurances without interest, "*upon any event or events whatsoever (a) ;*" and therefore there can be no doubt but that it extends to insurance against fire; and that the insured, whatever may be the amount of his insurance, can only recover to the extent of his interest.

The insured can only recover, in case of loss, to the extent of his interest.

There is no doubt but that insurances against fire are often made to a large amount upon property of very small value. This can only be done with a fraudulent view, and a premeditated fire must be the necessary consequence.—Where a loss has happened, and there is no colour to suspect any unfair practice on the part of the insured, I think the offices ought not to content themselves with being merely just: They ought to be generous and liberal towards a fair sufferer. But where there is any reasonable ground to suspect fraud, it is to be hoped that the managers of no office will, from any false notion of generosity, or any wish to acquire popular favour, so far forget what they owe to the public, as well as to their own characters, as to suffer the claim to be satisfied, without the most scrupulous investigation.

The necessity of preventing insurances against fire, without interest.

It often happens that no one office will insure to the full amount required by a particular person, who has a large property to insure; and in such case, the party can only cover his whole interest, by several insurances made at different offices. But then it is proper that each office should have notice of every insurance thus made on the same effects; for otherwise great frauds might be practised by insuring the same property to its full value, at several different offices at the same time. To guard against such frauds, there is, in the printed proposals of each of the offices, an article which declares that, persons insuring must give notice of any other insurance made elsewhere upon the same houses or goods, that the

If there be several insurances on the same property, each office must have notice of this.

(a) The 4th section provides that it shall not extend to marine insurances, which shews that it was the intention of the legislature that it should extend, according to the above words in the enacting clause, to every other species of insurance.

same may be allowed by indorsement on the policy; in order that each office may bear its rateable proportion of any loss that may happen (a). But unless such notice be given of each insurance to the office where another insurance is made on the same effects, the insurance made, without such notice, will be void.

But a person may insure without having the absolute property.

It is not necessary, however, in order to constitute an insurable interest, that the insured shall, in every instance, have the absolute and unqualified property of the effects insured. A trustee, a mortgagee, a reversioner, a factor or agent, with the custody of goods to be sold upon commission, may insure; but with this caution, that the nature of the property be distinctly specified (b); and that all the insurances upon the same property, taken together, shall not exceed the full value thereof.

(a) Vid. sup. 115.—(b) See the 6th article of the proposals of the *Sun* fire-office, and 7th article of the proposals of the *Phoenix* fire-office.

C H A P. III.

Of the Risk which Insurers engage to run.

BY the terms of the usual policy the insurers undertake to pay, make good, and satisfy to the insured all loss or damage, which may happen by fire, during the term specified in the policy, to the houses or other buildings, furniture, or merchandize insured.

The risk usually insured against.

By an article of the printed proposals, which, as we shall presently see (a), are now to be considered as making a part of the contract, it is provided that, "No loss or damage by fire, happening by any invasion, foreign enemy, or any military or usurped power whatsoever, will be made good by this company."

The proviso, excepting fires occasioned by extraordinary events.

In the following case, a question arose upon the construction of the words *usurped power* in this proviso.—It was an action of covenant on a policy of the *London Assurance* company against fire, upon a malting office at *Norwich*.—The defendants, amongst other pleas, pleaded that the malting office was burnt by *an usurped power*; and issue being joined on this plea, the cause was tried at *Norwich* assizes, and a verdict found for the plaintiff, damages 469 l. subject to the opinion of the court upon a case, which stated, 'That on the 27th of *November*, a mob arose at *Norwich*, on account of the high price of provisions, and spoiled and destroyed a considerable quantity of flour: That thereupon the proclamation was read, and the mob dispersed for that time. That afterwards another mob arose and burnt down the malting office mentioned in the policy.'—This case was twice

The words *usurped power*, in the proviso, mean an invasion from abroad or an internal rebellion; not the power of a common mob.

Drinkwater v. Lond. Assur.
2 *Wils.* 363.

(a) Vid. *Oldman v. Bewicke*, *Routledge v. Burrell*, and *Wood v. Worsley*, inf. ch. 5.

argued at the bar, and the court took time to deliberate. At length Lord C. J. *Wilmot*, Mr. Justice *Clive*, and Mr. Justice *Bathurst*, against the opinion of Mr. Justice *Gould*, determined that the true import of the words *usurped power* in the proviso, was, an invasion from abroad, or an internal rebellion, where armies are drawn up against each other; when the laws are silent; and when the firing of towns becomes unavoidable: But that those words could not mean the power of a common mob.

The words *civil commotion*, were held to exclude losses in the riots of 1780.

The *London Assurance* company still, however, retain the proviso in its original form. The *Sun* fire-office, in the year 1727, added the words *civil commotion (a)*; and upon the construction of these words another question arose in consequence of the tumults with which the metropolis of the *British* empire was disgraced in the summer of the year 1780. These tumults were excited by certain persons who, under the mask of religion, pretended to seek the repeal of a law then lately passed, granting to *Roman* catholics, certain indulgences and some mitigation of the hardships under which they, at that time, laboured in this country; but their object was nothing less than the entire subversion of the government. And to accomplish this purpose, they excited to universal devastation, a desperate and lawless rabble, made up of malefactors and fanatics, who, though actuated by different motives, are at all times equally prone to mischief and rebellion. Fortunately for this country, the militia was at that time embodied, the rioters were repressed, and the constitution preserved.

(a) Most of the other offices have introduced the same words; and some have the words '*riot, tumult, and civil commotion.*' It is rather remarkable, however, that neither the *Hand in Hand* or the *Union* fire offices has any proviso or exception of this nature in their printed proposals. It were, perhaps, to be wished, that none of the offices would insure against the mischiefs occasioned by riot and civil commotion. Men cannot be too deeply interested in the preservation of the public peace, and the support of lawful authority.

Amongst

Amongst others devoted to destruction by this desperate banditti, was Mr. *Langdale*, a catholic, and a considerable distiller. His premises they fired; and all his stock of liquors and other effects were there destroyed.—Being insured at the *Sun Fire Office*, he brought his action upon the policy, to recover a satisfaction for the loss he had thus sustained. The office defended this action on the ground that this loss was occasioned by *civil commotion*.—The cause was tried by Lord *Mansfield*, and, upon the facts of the plaintiff's case being proved, the point was argued very much at large by the counsel on both sides.—Lord *Mansfield*, in his address to the jury said;—"Most undoubtedly every man's leaning must be to the side of the plaintiff, in order to divide the loss in so great a calamity. But that inclination must be governed by the rules of law and justice; and the only question to be determined arises singly upon the construction of two words in the policy. It appears that in the year 1720, the *London Assurance* company put into their policies all the words here used, except *civil commotion*; and any fire happening by a foreign enemy is clearly provided against, whether they burn houses, or set fire to a town. The words *military or usurped power* are ambiguous; but they have already been the subject of a judicial determination (a). They must mean rebellion, conducted by authority; as in the year 1745, when the rebels came to *Derby*; and if they had ordered any part of the town, or a single house, to be set on fire, that would have been by authority of a *rebellion*. That is the only distinction in the case:—It must be by rebellion got to such a head, as to be under some authority. In the year 1726, the *Sun Fire Office*, in imitation of the *London Assurance* company, inserted the same exception: This provided against rebellion, determined rebellion, with generals who could give orders: But the *Sun Fire Office* did not think this sufficient; and therefore, in the year 1727, they introduced the words *civil commotion*;

Langdale v. Ma-
son and others,
at N. P. Mich.
Vac. 1730. MS.

(a) Vid. *Drinkwater v. Lond. Assur.* sup. 687.

words as general and untechnical as can possibly be used. They do not say *civil commotion*, such as amounts to *high treason*. They avoid saying civil commotion amounting to *felony* or to a *misdemeanour*, but they use the term "civil commotion," taking the largest and most general sense of the words that the language will allow: They do not even say a *riot*. It may be a question, in point of law, whether an assembly or multitude be a riot. But the single question here is, whether this has been a civil commotion. If there be a case, to which these words can be applicable, it is to a case of this sort. I cannot see any of the other words, to which it can be applied. Usurped power takes in rebellion, acting under usurped authority. From a foreign enemy the office is secured: But what is a civil commotion? It is something else. The present was an insurrection of the people resisting all law, setting the authority of the government at nought; and depriving of its protection whoever was obnoxious to them. What was the object and end of this violent insurrection? It took place in many parts of the town at the same time, and the very same night; the mob were in *Broad-street*, *St. Catherine's*, in *Coleman-street*, at *Blackfriar's Bridge*, and at the plaintiff's. What is their object? *General destruction, general confusion*. It certainly was meant to aim at the very vitals of the constitution. It was not a private matter, under a cry of *No popery* only, to destroy all papists. *Newgate* is burnt down: The *Fleet* prison, the *King's Bench* prison, the new *Bridewell*, are burnt down, and all the prisoners set at liberty. The *Bank* attacked; the *Excise* and *Pay* offices in *Broad-street* threatened. The houses of a vast number of papists burnt and destroyed. Military resistance necessary, and an extraordinary stretch was made, which was justified by necessity. Many men have been killed. What is this but a *civil commotion*, if any precise meaning can be affixed to those words. It is said that this is a civil commotion distinct from usurped power and rebellion. It is admitted, that this kind of insurrection may amount to high treason: and, to be sure, it may. But the office do not mean to
try

try whether these rioters were guilty of high treason or not. It is not put upon that, but on the ground of a civil commotion. It is not an occasional riot: That would be another question. I do not give any opinion what that might be. You will give your opinions, whether the facts of this case bring it within the idea of a civil commotion. I think a civil commotion is this; *an insurrection of the people for general purposes*, though it may not amount to a rebellion, where there is an usurped power. If you think it was such an insurrection of the people for the purposes of general mischief, though not amounting to a rebellion, but within the exception of the policy, you will find for the defendants. If not, you will find for the plaintiffs. The jury found a verdict for the defendants.

But Mr. Langdale was not without remedy. He afterwards brought his action against the *Hundred*, upon the riot act, 1 G. I. c. 5, § 6, and recovered a full satisfaction for the damage he had sustained.—Had the office not been exempted from this loss by the words *civil commotion* in their proposals, they would have had their remedy over against the *Hundred*. In the following case, which came before the court of King's Bench in the year 1782, it was determined that an insurance company, having paid a loss occasioned by riots, may recover back such loss, in an action against the *Hundred*, on the above act, brought in the name of the insured.

But an insurance company who pay a loss, occasioned by riots, have their remedy over against the *Hundred*, by action upon the riot act, in the name of the insured.

That was an action brought against the *Hundred* on the riot act, stat. 1 G. I. c. 5, § 6, to recover a satisfaction for the damage sustained by the plaintiff, by the demolition of his house, in the riots of 1780.—Upon the trial of the cause, there was a verdict for the plaintiff, with 259 l. damages, subject to the opinion of the court on a case, which stated, in substance, that the plaintiff had insured his house in the *Hand in Hand* fire office; that the fire office had paid the loss, without any action being brought against them; and that this action was brought against the *Hundred* in the plaintiff's name, and with his consent, for the benefit of the insurance office, and to reimburse them the loss they had paid.—The question was

Mason v. Sainbury, E. 22 G. III. B. R.—MS.

whether, as the plaintiff had already received a satisfaction, this action could now be maintained against the Hundred on behalf of the insurers.—It was contended, on the part of the Hundred, that it was the policy of the act, beside the inducement to suppress riots, to divide the loss, and prevent the ruin of individuals; but there could be no reason of policy or justice to extend this, beyond the party himself, to bodies or individuals, who have wilfully put themselves into this danger: That though it was true that a man, having different remedies may pursue either, and it is no defence to the one, that he might have pursued other; yet, when he has recovered by one, he shall not afterwards seek a second satisfaction by the other.—But the court were unanimously of opinion that the office had a right in this case, to recover against the Hundred, in the name of the insured.—Lord *Mansfield*, said;—"Though the office paid without a suit, this must be considered as without prejudice; and it is, to all intents, as if it had never been paid. The question comes to this: Can the owner of the house, having insured it, come against the Hundred, under this act? Who is first liable? If the Hundred be first liable, still it makes no difference: If the insurers be first liable, then payment by them is a satisfaction, and the Hundred is not liable. But the contrary is evident, from the nature of the contract of insurance. It is an *indemnity*. We every day see the insured put in the place of the insurer. In abandonment it is so; and the insurer uses the name of the insured. It is an extremely clear case. The act puts the Hundred in the place of the trespassers; and on principles of policy, I am satisfied that it is to be considered as if the insurers had not paid a farthing."—Mr. Justice *Willes* said;—"I cannot distinguish this from the case of an escape. If the sheriff pays, he has his remedy over against the party. Though the Hundred is not answerable criminally, yet they are not to be considered as wholly free from blame. They may have been negligent, which is partly the principle of the act."—Mr. Justice *Asburi* said;—"At all events the plaintiff is entitled to a *verdict* to the amount of the premium, having

having had no compensation as to that. But, on the larger ground, I am of opinion that the Hundred is liable in this action for all the damage sustained by the plaintiff. It is like the case of an abandonment, and the office is not to be in a worse situation for having paid the loss without a suit."—Mr. Justice *Buller* said ;—"Whether this case be considered on strict, or on liberal, principles of insurance law, the plaintiff must recover. Strictly, no notice can be taken of any thing out of the record. The contract with the office, strictly taken, is a wager ; liberally, it is an indemnity : But, on the words, it is only a wager, of which third persons shall not avail themselves. It has been rightly admitted that the Hundred is put in the place of the trespassers. How could the trespassers have availed themselves of this satisfaction made by the Office ? Could they have pleaded it by way of *accord and satisfaction*. It was not paid as a satisfaction for the trespass, and the facts of the case would not have supported such a plea. The best way is to consider this case as a contract of indemnity, in which the principle is, that the insurer and the insured are as one person ; and in that light, the paying before or after, can make no difference."

In general the risk commences from the signing of the policy, unless some other time be specified ; and it will of course end with the term for which it is made. Insurances against fire are, in general, either annual, or for a term of seven years, at an annual premium ; and the offices, as an indulgence to the insured, generally allow 15 days from the expiration of each year for the payment of the premium for the next succeeding year. But the insured has always been considered as being under the protection of the policy till the expiration of the 15 days, provided the premium were paid within that time.

How far the insured is protected by the policy during the 15 days allowed for paying the renewed premium.

In the printed proposals of the *Sun Fire Office*, and of some others, there is this article :—"On bespeaking policies, all persons are to make a deposit for the policy, stamp duty, and mark ; and shall pay the premium

How far in the case of a half-yearly policy.

‘mum to the next quarter-day, and from thence for one
 ‘year more at least; and shall, as long as the managers
 ‘agree to accept the same, make all future payments
 ‘annually at the said office, within 15 days after the
 ‘day limited by their respective policies, upon forfeiture
 ‘of the benefit thereof; and no insurance is to take place
 ‘till the premium be actually paid by the insured, his, her,
 ‘or their agent or agents.’—In the following case it became
 a question how far the insured, upon a half-yearly policy,
 was protected during the 15 days, before the new pre-
 mium was actually paid and accepted.

The insured in
 a policy agrees
 to pay the pre-
 mium half-
 yearly, within
 15 days of the
 expiration of the
 former half year.
 A loss happens
 within the 15
 days, but before
 the renewed
 premium is paid.
 —The insurers
 are not liable,
 though the pre-
 mium was ten-
 dered before the
 end of the 15
 days.

*Tarleton and
 others v. Stan-
 forth and others.*
 5 T. R. 695.

It was an action against the *Liverpool* fire-office, which
 had adopted the above article. The plaintiff declared
 on a policy dated the 10th of *December* 1788, in which,
 (after reciting that the plaintiffs had paid 7l. 10s. to
 the office, and had agreed to pay 7l. 10s. on the 10th
 of *June* 1789, and the like sum every six months during
 the continuance of the policy), it was declared that,
 from the date of the policy, so long as the plaintiffs
 should pay the sum of 7l. 10s. at the times and places
 aforesaid, and the trustees or acting members of the
 society should agree to accept the same, the funds of
 the society should be liable to pay the plaintiffs such
 damage and loss as they should suffer by fire, not exceed-
 ing 6000 l. according to the exact tenor of their printed
 proposals.—The declaration, after setting forth the above
 article of the printed proposals, stated that the society
 had, from the year 1777, been in the practice of in-
 suring for periods less than a year, by policies similar to
 the present, referring, in like manner, to the same printed
 proposals; and that they had received the premiums
 within the 15 days after the times limited in such poli-
 cies, and the policies thereupon remained in force. It
 then stated a loss, to the amount of 6000 l. on the 11th
 of *December* 1789, before the expiration of the 15 days,
 and before any refusal to accept the renewed premium,
 or to continue the policy. There was a second count,
 stating that, before the expiration of the 15 days, the plain-
 tiffs tendered at the office 7l. 10s. to the managers of the
 society

society, they not having then disagreed or refused to accept the same.—The defendants, amongst other pleas to the first count, pleaded that the plaintiffs did not pay the sum of 7 l. 10 s. on or before the 10th of *December*, as they ought to have done, in order to have continued the policy to the time when the loss happened. To the second count they pleaded, that the sum of 7 l. 10 s. was not tendered to the managers, until after the 10th of *December*.—Upon a demurrer to these pleas, the court determined that, under the above circumstances, the plaintiffs were not entitled to recover, and gave judgment for the defendants.—Lord *Kenyon* said;—"It is admitted that the insurance did not extend to half a year and 15 days; and that completely puts an end to the whole case. The plaintiffs stipulated to pay 7 l. 10 s. half yearly, on the 10th of *June*, and the 10th of *December*; and that they would, *as long as the managers agreed to accept the same*, make their payments within 15 days after the day limited; *but no insurance is to take place until the premium be actually paid*. The continuation of the term, therefore, depends on two circumstances which must both concur; namely, that the insured should pay the 7 l. 10 s. and that the insurers should agree to accept that sum. Barely stating these facts is sufficient to shew that the plaintiffs are not entitled to recover.

Soon after the above decision, the *Royal Exchange*, the *Phoenix*, and some other insurance companies gave notice that they did not mean to take advantage of this judgment; but would hold themselves liable for any loss during the 15 days that are allowed for the payment of the renewed premium upon annual policies, and others for a longer period: But that every policy for a shorter period than a year, would cease at six o'clock in the evening of the day mentioned therein,

But several offices hold themselves liable during the 15 days on annual policies.

CHAP. IV.

Of the Assignment of the Policy.

An assignment of the policy to one who has no interest in the effects insured, is void.

A POLICY of insurance, being a *chose in action*, is, in strictness, not assignable at law. But, like every other *chose in action*, it may be assigned in equity; and courts of law now take notice of such assignment; so that the ancient rule of the common law, being often found injurious to the interests of a commercial country, is now, in a manner, disregarded, or at least evaded. But the mere assignment of the policy, would be of little avail, without an assignment of the subject matter of the insurance also. The assignee could derive no benefit from the policy, unless the interest of the insured were transferred with it; because, as we have already shewn, the insured must not only have an interest in the subject matter of the insurance, at the time of insuring, but also at the time the loss happens (a).

Upon the death of the insured, the policy is continued to his representative.

In the printed proposals of all the offices it is declared that, upon the death of an insured, his interest in the policy shall be continued to his representative to whom the property insured belongs, provided such representative, before any new payment be made, procure his right to be indorsed on the policy at the office.

The contribution societies seem to allow the assignment of their policies without any express permission.

In the proposals of the *Hand in Hand* fire office, it is declared, that if the premises insured should be assigned, the assignment must be entered at the office; and that assignments of policies shall be entered at the office, within 42 days after they are executed; or else the assignee shall have no benefit thereby. And in the pro-

(a) Per Lord King, Ch. in *Lynch v. Dalzell*, inf. 698; Per Lord Hardwicke Ch. in the *Sadlers Case* any v. *Badcock*, inf. 700; vid. sup. 684.

posals of the *Union* fire office, it is declared, that every member transferring his policy, shall, within three months, give notice to the directors, and bring their policies to the office, to have such transfer indorsed.

The *Westminster* office merely desires that the assignment shall be entered at the office as soon as possible. So that, it would seem, the policies of these three *contribution societies* may be assigned, without any express permission from the respective offices for that purpose; and that it is sufficient if the assignment be brought to the respective offices to be entered.

But the other offices give notice, generally upon the policy, that it shall be of no force if assigned, unless such assignment be allowed by an entry in the books of the office, or indorsed on the policy. So that it seems to be a settled rule in all the offices, not to allow any transfer of any policy, without the consent of the managers. This is perfectly reasonable. The offices may chuse for whom they will insure; they are not obliged to insure for every person that may apply to them. In some instances, character may be a sufficient reason for a refusal. But the offices would be deprived of this option, if any person insured might assign his policy to whom he pleased, without their concurrence. This will appear from the following case.

On the 28th of *July* 1721, one *Richard Ireland* obtained a policy from the *Sun* fire-office for the insurance of his house, being the *Angel* inn at *GraveSEND*, with his goods therein, from loss and damage by fire: And it was agreed, that so long as *Ireland* should pay five shillings a quarter, the society would satisfy the said *Ireland*, his executors, administrators, and assigns, his loss not exceeding 1000*l.* according to the exact tenor of their printed proposals.—Some considerable time afterwards, *Ireland* died, leaving his son *Anthony* his sole executor: who brought the policy to the office, and had an indorsement made thereon, that the same belonged to him; and he afterwards paid one year's premium up to *Christmas* 1727. In *August* 1727, the house was destroyed by fire; and some time afterwards, the plain-

But the other offices allow of no assignment, without their express permission.

The insured, upon a house and goods assigns the house to *A.* and the goods to *B.*; *B* assigns the goods over to *A.* to secure to *A.* the money advanced for *B.* to purchase them. Afterwards a fire happens, and the insured assigns the policy to *A.*; and *B.* also assigns to him his interest in the policy. These assignments of the policy being made after the fire happened, and without the

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consent of the office, the assignee cannot recover the loss under it.

Lynch and another v. Dalzell and others,
3 Bro. Parl. Ca. 497.

tiffs applied to the office, and alledged that they had purchased the house and goods of *Anthony Ireland*; that the same were their property at the time of the fire; and that they had an assignment of the policy made to them, at the same time that the house and goods were assigned; and they produced an affidavit from *Roger Lynch*, in which he swore that their loss, by the burning of the house, amounted to 500 l. and upwards; and upon this affidavit was indorsed the usual certificate from the minister and churchwardens, &c.: But neither in the affidavit or certificate, was any mention made of any loss being sustained by the plaintiffs by the burning of any goods; nor was any affidavit made by *Anthony Ireland*, that he had suffered any loss.—The plaintiffs, however, insisted that the office should pay them 1000 l. for their loss by the burning of the house and goods; and they filed a bill in chancery, setting forth, that *Anthony Ireland*, on the 24th of *June 1727*, for 250 l., assigned to them a lease of the house and stables; but, that the goods, for which the plaintiffs, as they alledged, were to pay 500 l., being intended for one *Thomas Church*, who was to hold the inn under them, *Ireland*, by bill of sale of the same date, sold the same to *Church* for his own use. The bill also stated the assignment of the policy to the plaintiffs; and that, although the bill of sale of the goods was made to *Church*; yet that the plaintiffs paid the purchase money, and *Church* assigned the bill of sale to them for securing it; and also released to the plaintiffs his interest in the policy.—The defendants, by their answer, alledged that the affidavit produced was not agreeable to the proposals; that no assignment of the policy was made to the plaintiffs, nor any assignment of it made to them by *Church*, till after the fire. They insisted that the policies issued by the office were not, in their nature, assignable, being only contracts to make good the loss which the contracting party *himself* should sustain; and that no other person was entitled to any benefit from it. The cause proceeded to issue; and witnesses being examined on both sides, it appeared upon the plaintiff's own evidence, that the agreement for the assignment of the

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the policy, (if any), was not till after the agreement for the purchase of *Ireland's* term in the house; and that the assignment of it, though bearing date *before*, was not made till some time *after* the fire: So that the agreement for assigning the policy was a voluntary concession on the part of *Ireland*, and independent of the bargain for the house, and not made till after *Ireland's* interest in the house was determined; nor carried into execution till after the loss had happened. And as to the plaintiff's property in the goods, they proved an assignment from *Church* to them, as a security for 300 l; but omitted to state *when* this assignment was made, though the defendants, by their answer, had put the time in issue.—Upon this case, the Lord Chancellor *King* dismissed the plaintiff's bill.—He said;—"These policies are not insurances of the specific things mentioned to be insured; nor do such insurances attach on the realty, or in any manner go with the same, as incident thereto, by any conveyance or assignment: But they are only special agreements with the persons insured, against such loss or damage as they may sustain. *The party insured must have a property at the time of the loss, or he can sustain no loss: and consequently can be entitled to no satisfaction.* There was no contract ever made between the office and the plaintiffs for any insurance on the premises in question. Not only the express words, but the end and design of the contract with *Ireland*, do, in case of any loss, limit and restrain the satisfaction to such loss as should be sustained by *Richard Ireland* only; and the indorsement on the policy transferred that right to his executor *Anthony Ireland* only. These policies are not in their nature assignable; nor is the interest in them ever intended to be transferable from one to another, without the express consent of the office. The transactions in the present case, by changing the property backwards and forwards, and rendering it uncertain whose the true property really was, raise a suspicion, and fully justify the caution of the office in preventing the assignment, without the consent of the managers; which method is pursued by all the insurance offices. Besides, the plaintiff's claim

The policy does not pass with the effects insured.

The policy is only assignable with the consent of the office.

claim is, at best, founded only on an assignment never agreed for, till the person insured had determined his interest in the policy, by parting with his whole property, and never executed till the loss had actually happened.” —Upon appeal to the House of Lords, the decree of the Court of Chancery was affirmed.

A lessee having an unexpired term of six years and an half in a house, insures for seven years. After the term expired the house is burnt, and afterwards, but before the expiration of the policy, the insured assigns it to the reversioner, without the concurrence of the office. — The assignee cannot claim any benefit under the policy.

The Sudler's Company v. Badcock and others, 2 Atk. 554.

The same principles were adopted in another case, where one *Anne Strode*, having six years and a half to come in a lease of a house from the plaintiffs, on the 27th of April 1734, insured the house for 400*l.* in the *Hand in Hand* fire office, for seven years, and thereby became a proprietor; and, on paying twelve shillings down, and 3*l.* some time after, the company agreed, out of their contribution stock, ‘to pay the said sum of 400*l.* to her, her executors and assignees, so often as the house should be burnt down during the said term, unless the directors should rebuild the same;’ and on the back of the policy it was indorsed, ‘that if the policy should be assigned, the assignment must be entered within 21 days after the making thereof.’ —Mrs. *Strode*’s lease expired at *Midsummer* 1740; the house was burnt down in *January* 1741; and she assigned the policy to the plaintiffs on the 23d of *February* 1741. The plaintiffs tendered the assignment to the defendants to be entered in their books, but they refused to accept it. The company, in 1738, which was subsequent to Mrs. *Strode*’s policy, made an order, ‘That whereas policies expire upon the property of the insured’s ceasing; if there is no application of the insured to assign, or to have the loss made up, then the person having the property, may insure the said house in the said office, notwithstanding the term for which the said house was originally insured is not expired.’ The question upon this cause was, whether the plaintiffs, the assignees of Mrs. *Strode*, were entitled to the benefit of the policy. —The court determined that they were not entitled to any benefit under it. —The Lord Chancellor *Hardwicke* said; — “During the progress of this cause, while the defendants seemed to depend chiefly upon the subsequent order,

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I was of opinion against them. But, upon hearing what was further offered, I think the plaintiffs are not entitled to be relieved. There may be three questions made in this cause. *First*, whether this accident, which has happened, be such a loss, as obliges the defendants to make satisfaction to the plaintiffs. *Secondly*, whether upon the terms of the original policy, the office be obliged to do it. *Thirdly*, which is rather consequential of the former, whether the plaintiffs are properly assignees of Mrs. *Strode*, under this policy. If this matter rested singly upon the policy itself, I should not think it such a loss, as would oblige the defendants to make satisfaction. Under this policy, the state of the case is, Mrs. *Strode* was only a lessee; her time expired at *Midsummer* 1740; the house was burnt down in *January* after, *within the seven years*; the plaintiffs, the *Sadler's Company*, were ground landlords, and entitled to the reversion of the term: Upon the 23d of *February*, seven months after the expiration of the term, and one month after the fire, the assignment was made, and in consideration of five shillings only; so that it must be taken as a voluntary assignment, as it stands before me. It has been insisted, on the part of the defendants, that the plaintiffs are not entitled to recover, as standing in the place of Mrs. *Strode*, because she had no loss or damage, her interest ceasing before the fire happened. And this introduces the second and third questions. I am of opinion, that it is necessary the party insured should have an interest or property at the time of insuring, and at the time the fire happens. It has been said for the plaintiffs, that it is in nature of a wager laid by the insurance company, and that it does not signify to whom they pay, if lost. Now these insurances from fire have been introduced in later times, and therefore differ from insurance of ships, because there, *interest or no interest* is almost constantly inserted; and if not inserted, you cannot recover, unless you prove a property. By the first clause in the deed of contribution in 1696, the year this society, called the *Hand in Hand Office*, incorporated themselves, the society

are to make satisfaction in case of any loss by fire. To whom, or for what loss, are they to make satisfaction? Why to the person insured, and for the loss he may have sustained; for it cannot properly be called insuring *the thing*, for there is no possibility of doing it, and therefore, must mean insuring *the person* from damage. By the terms of the policy, the defendants might begin to build and repair within six days after the fire happens. It has been truly said, this gives the society an option to pay or rebuild, and shews most manifestly that they meant to insure upon the property of the insured, because nobody else can give them leave to lay even a brick; for another person might fancy a house of a different kind. Thus it stands upon the original agreement. The next question will be, whether the subsequent order made by the defendants in 1738, has made any alteration. I am of opinion that it has not; for it was made only to explain a particular case in the policy, for it might have been a question, whether Mrs. *Strode* could have come before the expiration of the term, to examine the books of the office, and therefore this order was made to give her such a power. It has been strongly objected that the society could not make such an order. I am very tender of saying, whether they can or not. Because, on the one hand, it might be hard to say, that, as a society, they cannot make any order for the good of the society: On the other hand, it would be a dangerous thing to give them a power to make an alteration, that may materially vary the interest of the insured. The assignment is not at all within the terms of this order, because it is plain, it meant an assignment before the loss happened. Now with regard to the loss happening before the assignment made, Mrs. *Strode* was entitled to nothing but what was to be paid back upon the deposit. It is plain she thought so, for if she had imagined she had been entitled to 400 *l.* would any friend have advised her to make a present of it to the plaintiff? The case of *Lynch v. Dalzell*, in the House of Lords, shews how strict this court and that house are, on the construction of policies, to avoid frauds."

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The foregoing determinations shew that, upon an assignment or other transfer of the property insured, the assignee should be very careful to get the policy regularly transferred to him, by the proper indorsement at the office. And in a former part of this work, (a) it was shewn that if the assignor undertake to get this done, he will be liable to the assignee for all the consequences of neglecting or omitting to do so; even though his undertaking was merely gratuitous.

If an assignor of the property insured undertake to get the policy transferred to the assignee, he will be liable to an action for neglecting to do so.

(a) Vid. *Wilkinson v. Coverdale*, sup. 207.

C H A P. V.

Of the Proof of Loss.

Of the account of the loss, the affidavits of the insured, and the certificate from the minister, &c. required by the printed proposals.

THE form of the policy is nearly the same in all the offices (a). The principal difference between them consists in the terms of certain *proposals*, as they are called, to which it refers, as making a part of the contract. One principal article, which is found in the proposals of several of the offices (b) imports,—‘ That persons insured sustaining any loss or damage by fire are forthwith to give notice thereof at the office, and, as soon as possible afterwards, deliver in as particular an account of their loss and damage, as the nature of the case will admit of ; and make proof of the same by their oath or affirmation, according to the form practised in the said office ; and by their books of accounts, or other proper vouchers, as shall be reasonably required ; and procure a certificate under the hands of the minister and churchwardens, together with some other reputable inhabitants of the parish, not concerned in such loss, importing,— ‘ That they are well acquainted with the character and circumstances of the person or persons insured, and do know or verily believe, that he, she, or they, really and by misfortune, without any fraud or evil practice, have sustained by such fire, the loss and damage, as his, her, or their loss, to the value therein-mentioned : ‘ But, till such affidavit and certificate of such insured’s loss shall be made and produced, the loss money shall not be payable. And, if there appear any fraud or false swearing, such sufferers shall be excluded all be-

(a) Vid. Append. No. VII.—(b) The *Royal Exchange*, the *Sum*, and the *Phoenix* fire offices.

‘nefit by their policies. In the policies of these offices the insurers undertake to pay the loss, not exceeding the sum insured, ‘according to the exact tenor of their printed ‘proposals,’ describing their proposals by their respective dates.

The above article, though not worded in the best possible manner, has undoubtedly a very beneficial tendency. Nothing can be more reasonable in a case where there is so great a temptation to fraud, than to require a testimonial from persons in public situations in the parish where a fire has happened, who have opportunities of informing themselves as to the characters of the insured, and the fairness of their claims; and who are not likely to connive at any fraud. “It is a duty,” says Mr. Justice Lawrence (a), “that the office owes to the public as well as to themselves, to take every precaution to protect themselves against fraud. And unless some such check as the present were interposed, the office would be holding out a premium to wicked men to set fire to their own houses.”—Perhaps it may, some time or other, be thought advisable for all the insurance companies to agree among themselves to have this article revised, and put into a more unexceptionable form, and to adopt it universally. The construction of this article has given occasion to several judicial decisions.

The reasonableness of requiring this proof.

The first was an action against the directors of the *Sun Fire-Office*, upon one of their policies. The plaintiffs, in their declaration, after stating that the bankrupt, the insured, had conformed to the above article, as to the notice, account, and affidavit of the loss; stated that the minister of the parish of *Portsea*, in which the loss had happened, resided at a distance from the parish, and was wholly unacquainted with the character and circumstances of the insured, and unable to make the certificate required by the policy; but that the insured had procured and delivered to the office a certificate under the hands of several reputable inhabitants of

To excuse the want of the certificate, it is not enough to allege that the minister resides out of the parish, and does not know the insured. And the want of this certificate is a defect of title, for which the court will arrest the judgment, after the plaintiff has obtained a verdict on the question of

(a) 6 T. R. 722.

fraud, and want of interest.

Oldman and others, assignees of Ingram, v. Bewicke and others, in C. B. Mich. 26 G. III. 2. H. Bl. 577, n.

the tenor required by the article. The defendants pleaded 1st, That the premises were wilfully set on fire, and burnt down by the insured. 2dly, That at the time of the supposed loss the insured had no interest in the premises. No notice was taken in any of the pleas, of the want of the certificate.—Issues being joined on the above pleas, the cause went to trial, and the jury found a verdict for the plaintiffs, damages 300l.—The demand was 1500 l. the sum insured.—The defendant moved in arrest of judgment, on the ground that the plaintiffs had not set forth in their declaration a sufficient title to recover upon the policy against the defendants.—In answer to this application, it was said that it was grounded either on the title being defective, or defectively set forth: That the latter objection was cured by the verdict, and the former varied by the defence set up by the pleas.—The court, however, arrested the judgment.—Lord *Loughborough* said,—“ Though I am satisfied the verdict was right, that the fire was accidental, and that the certificate could not have been procured, because the insured had not sustained all the loss he claimed; yet the rule of intendment after verdict cannot be applied where there is an absolute defect of title, as there is in this case. As to the pleas, they are wholly collateral to the title.”—Mr. Justice *Gould* said,—“ Till the affidavit is made, and the certificate procured, the money is not payable: The time of payment, therefore, is not yet come. Though a person were a *bonâ fide* sufferer, still he is not entitled without a certificate. The stipulation is a condition precedent, that there shall be a certificate to shew that there is no kind of fraud. Nothing is said about the churchwardens; and the excuse of the minister living at a distance is frivolous.”

The article of the printed proposals requiring the certificate, though without stamp, seal, or signature, and though only referred to in the

The next case upon this subject was an action of covenant brought by the executrix of the insured on a policy of the *Sun Fire-Office*.—The declaration, by way of excuse for not producing the certificate required by the above article, stated that the testator, the insured, after the loss, being entitled to such certificate, applied to the

minister and churchwardens, and to many reputable inhabitants to procure such certificate; but that the defendants, by false insinuations, and promises of indemnity, prevailed on the minister, &c. to refuse to sign it.

—The defendants, as to the first breach of covenant, pleaded, 1st, That the insured had no interest in the goods, &c. insured; and 2dly, That they did not prevail on the minister, &c. to refuse to sign the certificate.

—And as to the second breach, they pleaded, 1st, No interest; and 2dly, That neither the testator in his life time, nor the plaintiff since his death, had procured such certificate.—Issue was joined upon the three first pleas, and the plaintiff demurred to the last.—In arguing that demurrer, it was contended on the part of the plaintiff, 1st, That a condition or restriction could not be annexed to, and made part of a deed, by words of mere reference to a printed paper, distinguished only by the date of the year in which it was printed, without any signature, seal, or stamp, to give it authenticity; and 2dly, That the restriction in question, though it were properly annexed to the deed, was bad in itself. Many authorities were cited in support of these propositions:—But the court said that the matter was too clear to admit of a doubt, and gave judgment for the defendants.

At length, in the following case, it has been fully settled, after solemn argument, and upon full deliberation, that the printed proposals are to be taken as part of the policy; that the procuring of the certificate from the minister and churchwardens, &c. is a condition precedent to the payment of the loss; and that the insured has no title to demand any loss, without this certificate, though he should be able to shew that the minister and churchwardens had wrongfully refused to sign one.

That was an action brought by the assignees of the insured, who had become bankrupts, against the *Phoenix* insurance company. The plaintiffs in their declaration, after stating the loss, and notice to the office, alledged that the bankrupts, soon after the loss, procured and delivered to the company a certificate under the hands

policy, is part of the contract, and is binding on the insured.

Routledge's Executrix v. Burrell, Bart. and another, 1 H. Bl. 254.

It is now settled that the procuring the certificate is a condition precedent to the payment of any loss; and that its being wrongfully refused will not excuse the want of it.

Wood and others assignees of Lothyer and Bream v. Worcester, 2 H. Bl. 574, 6 T. R. 710.

of divers reputable householders in the parish, in the usual form; and that, 'as soon as possible after the loss, they applied to, and requested, the minister and churchwardens of the parish to sign such certificate; but that the said minister and churchwardens, without any reasonable or probable cause whatsoever, did wrongfully and unjustly refuse to sign any such certificate as aforesaid.' There was another similar count, only omitting the request to the minister and churchwardens to sign the certificate, and their refusal.—To the first count, the defendant pleaded; 1st, Want of interest in the bankrupts; 2dly, That the loss happened by fraud; and 3dly, That the minister and churchwardens did not wrongfully, and without probable cause, refuse to sign the certificate.—To the second count the defendant pleaded similar pleas, as to want of interest and fraud; and 3dly, That neither the bankrupts nor the plaintiffs had procured any certificate from the minister, churchwardens, and reputable inhabitants, as is required by the said printed proposals.—By the replication issue was joined on the first five pleas; and, as to the last plea, the plaintiffs assigned the same excuse for the want of the certificate from the minister, &c. as in the first count of the declaration; and this having proceeded to issue, the cause was tried and the plaintiffs obtained a verdict for 3000 l.—The defendant moved in arrest of judgment on the same ground, as in the case of *Oldman v. Bewicke* (a), namely, that the production of the certificate was a condition precedent to the payment of loss, and that the plaintiffs not having averred performance, had shewn no title to recover.—After the argument, Lord C. J. *Eyre*, Mr. Justice *Buller*, and Mr. Justice *Rooke*, seemed to be of opinion that, supposing the printed proposals to be conditions precedent, there had been a performance *cy pres*; but that, in truth, the policy being a commercial contract, was to be construed liberally, and the true question was, whether the loss had been fairly incurred. If it had, and it appeared on the record to have so happened, the refusal of the

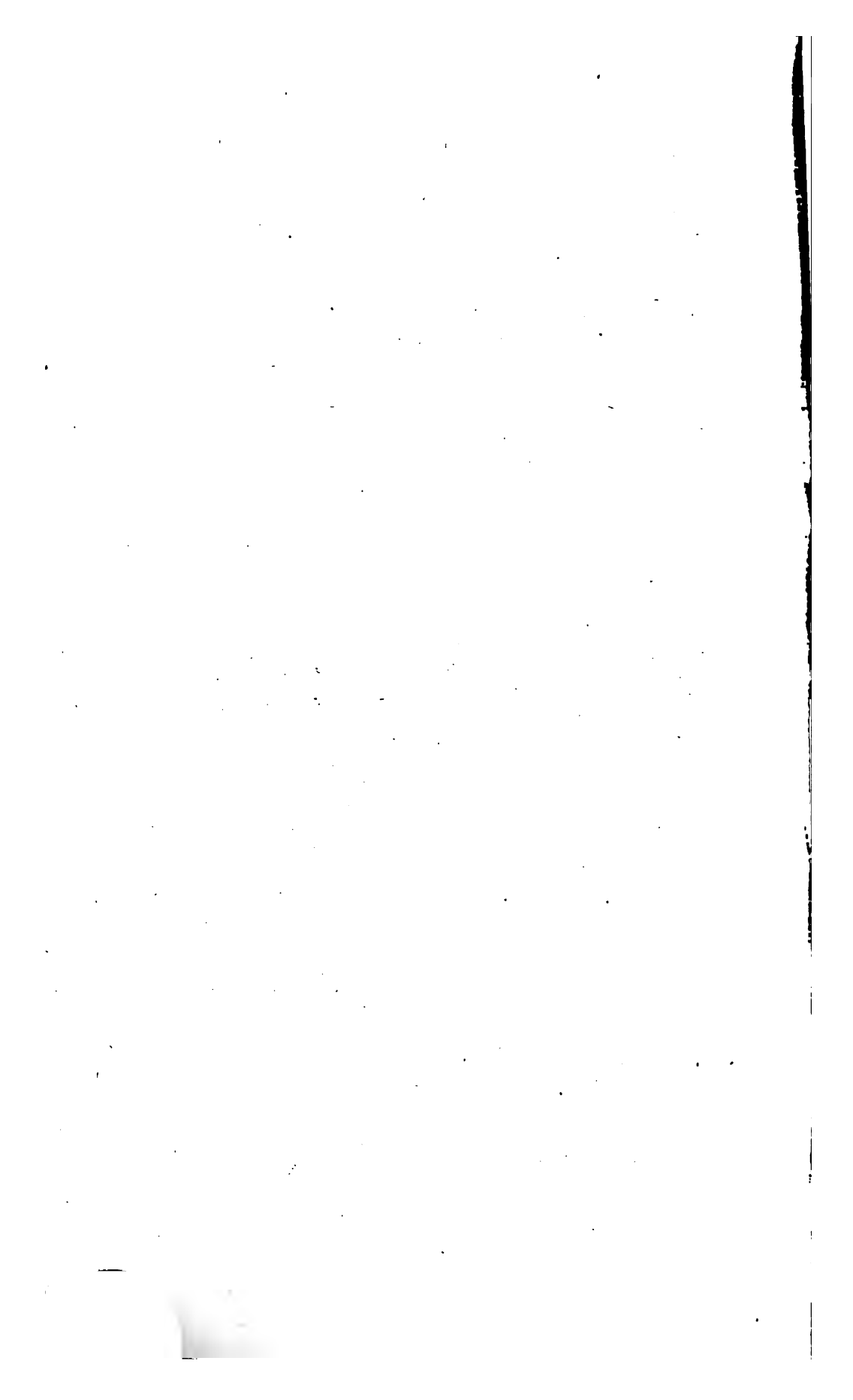
(a) Sup. 703.

minister and churchwardens was without cause, and therefore the plaintiffs were entitled to maintain their action. But Mr. Justice *Heath* appeared to differ from the rest of the court, and time was taken to deliberate.—

Afterwards, judgment was given for the plaintiffs, *pro forma*, as it was understood that a writ of error would be brought, whichever way the judgment should be given.

—Upon this writ of error, the court of King's Bench, after two arguments, reversed the judgment of the court of Common Pleas, being unanimously of opinion that the production of the certificate was a condition precedent.—

Lord *Kent* said he did not see how the term *cy præs* was applicable to this subject; that the argument founded on this, went to shew that if none of the inhabitants of this parish would certify, a certificate from the inhabitants of the next, or of any other parish, would have answered the purpose. But he said that the insured could not substitute other terms or conditions in lieu of those which all the parties to the contract had originally made.



APPENDIX.

No. I.

Form of a valued Policy of Insurance upon Ships and Goods, by private Underwriters.

£. 10,000
Delivered the
Day of

S. G. } IN the name of God, *Amen.*
as well in own name
as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall, appertain, in part or in all, doth make assurance, and cause and them, and every of them, to be insured, lost or not lost, at and from upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called *The* whereof is master, under God, for this present voyage or whosoever else shall go for master in the said ship, or by whatsoever other name or names the same ship, or the master thereof, is or shall be named or called: Beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship upon the said ship, &c. and so shall continue and endure during her abode there, upon the said ship, &c. And further, until the said ship, with all her ordnance, tackle, apparel, &c. and goods and merchandizes whatsoever, shall be arrived at upon the said ship, &c. until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes until the same be there discharged and safely landed: And it shall be lawful for the said ship, &c. in this voyage, to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this insurance; the said ship, &c. goods and merchandizes, &c. for so much as concerns the assureds, by agreement between the assureds and assurers, in this policy, are and shall be valued at Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage, they are,

of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainerments of all kings, princes and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage, of the said goods and merchandizes, and Ship, &c. or any part thereof; and in case of any loss or misfortune it shall be lawful to the assureds, their factors, servants, and assigns, to sue, labour and travel, for, in, and about, the defence, safeguard, and recovery, of the said goods and merchandizes, and ship, &c. or any part thereof, without prejudice to this insurance, to the charges whereof we the assurers will contribute each one according to the rate and quantity of his sum herein assured; And it is agreed by us the insurers that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elsewhere in *London*; And so we the assurers are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assureds, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured

at and after the rate of

In witness whereof we the assurers have subscribed our names and sums assured in *London*.

N. B. Corn, fish, salt, fruit, flour, and seed, are warranted free from average, unless general, or the ship be stranded;—Sugar, tobacco, hemp, flax, hides, and skins, are warranted free from average under five pounds *per cent.*; and all other goods, also the ship and freight, are warranted free of average under three pounds *per cent.* unless general, or the ship be stranded,

Appendix, No. II.

merchandizes, &c. for so much as concerns the assureds, (by agreement made between the assureds and the said corporation in this policy), are and shall be rated and valued at

Sterling, without farther account to be given by the assureds for the same. Touching the adventures and perils which the said corporation are contented to bear and do take upon them in this voyage, they are, of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprizals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage, of the said goods and merchandizes, and ship, &c. or any part thereof: And in case of any loss or misfortune it shall be lawful to the assureds, their factors, servants, and assigns, to sue, labour, and travel, for, in, and about, the defence, safeguard, and recovery, of the said goods and merchandizes, and ship, &c. (or any part thereof), without prejudice to this assurance, to the charges whereof the said corporation will contribute according to the rate and quantity of the sum herein assured: And it is agreed by the said corporation that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elsewhere in *London*: And so the said corporation are contented, and do hereby promise and bind themselves and their successors to the assureds, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for this Assurance by
at and after the rate of

per cent. In witness whereof the said Corporation have caused their common seal to be hereunto affixed, and the sum or sums by them assured to be hereunder written, at their office in the *Royal Exchange of London* this

Day of
in the year of the reign of our Sovereign Lord
by the grace of God, of the
united kingdom of *Great Britain* and *Ireland*, King, Defender
of the Faith, and in the year of our Lord

The said corporation are content with this assurance for

Free

Free from all average on corn, flour, fish, salt, fruit, seed, hides, and tobacco, unless general, or otherwise specially agreed.

Free from average on sugar, rum, skins, hemp, and flax, under five *per cent.*; and on all other goods, and on ship, under three *per cent.* except general.

By order of the Court of Directors.

No. III.

Form of a Policy of Insurance on Ship and Goods by the London Assurance Company.

SHIP AND GOODS.

London Assurance House.

No. No. in *London.*

By the Governor and Company of the *London Assurance.*

IN the name of God, *Amen.*

as well in own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall, appertain; in part or in all, doth make assurance, and causeth and them, and every of them, to be assured, lost or not lost, at and from upon any kind of goods and merchandizes whatsoever; and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called *The* whereof is master (under God) for this present voyage or whoever else shall go for master in the said ship or vessel, or by whatsoever other name or names the said ship or vessel, or the master thereof, is or shall be named or called: Beginning the adventure upon the said goods and merchandizes from and immediately following the loading thereof aboard the said ship or vessel at and upon the

the said ship or vessel, &c. and so shall continue and endure during her abode there, upon the said ship or vessel, &c.; and farther, until the said ship or vessel, with all her ordnance, tackle, apparel, &c. and goods and merchandizes whatsoever, shall be arrived at and upon the said ship or vessel, &c. until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes, until the same be there safely discharged and landed: And it shall be lawful for the said ship or vessel, &c. in this voyage, to proceed and sail to, and touch and stay at, any any ports or places whatsoever without prejudice to this assurance, the said ship or vessel, &c. goods and merchandizes, &c. for so much as concerns the assureds, (by agreement between the assureds and the *London* assurance), are and shall be rated and valued at without farther or other account to be given by the assureds for the same. Touching the adventures and perils, which the said *London* assurance are contented to bear and do take upon them in this voyage, they are, of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprizals, takings at sea, arrests, restraints, and detainerments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage, of the said goods and merchandizes, and ship or vessel, &c. or any part thereof: And in case of any loss or misfortune, it shall be lawful to the assureds, their factors, servants, and assigns, to sue, labour, and travel, for, in, and about, the defence, safeguard, and recovery, of the said goods, merchandizes, and ship or vessel, &c. or any part thereof, without prejudice to this assurance, to the charges whereof the said *London* assurance will contribute according to the rate and quantity of the sum herein assured: And it is agreed that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elsewhere in *London*: And so the said *London* assurance are contented, and do hereby promise and bind themselves and their successors to the assureds, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for this assurance by the assured, at and after the rate of *per cent.* In witness whereof the said

said *London* assurance have caused their common seal to be here-
unto affixed, and the sum or sums by them assured to be here-
under written, at their office in *London*, this day of
in the year of the reign of our Sovereign Lord
by the grace of God, of the united kingdom of *Great Britain*
and *Ireland*, King, Defender of the Faith, and in the year
of our Lord

Free from all average on corn, flour, fruit, fish, salt, and
seeds, except general.

Free from average on sugar, rum, hides, skins, hemp, flax,
and tobacco, under five pounds *per cent.*; and on all
other goods, and ship, under three pounds *per cent.* except
general.

The said governor and company are content with this assurance
for

No. IV.

No. IV.

Form of a Bill of Bottomry, by deed poll, where the Ship is to go to several Ports.

TO ALL PEOPLE, &c. I *A. B.* of, &c. mariner, master, and part owner of the good ship or vessel, called, &c. of *London*, of the burthen of two hundred tons, or thereabouts, now riding at anchor in the river *Thames*, within the port of *London*, do fend greeting: WHEREAS the said ship is now bound out upon a voyage from the said port, unto the island of *Barbadoes*, and from thence, if occasion shall be, to the island of *May*, and so to return back again to the said island of *Barbadoes*, and thence to *London*, to end her voyage: NOW KNOW YE, that I the said *A. B.* for myself, my executors and administrators, do covenant and grant, to and with *C. D.* of &c. (who, before the sealing and delivery hereof, hath paid and advanced unto me the said *A. B.* the sum of 500 *l.* of lawful money of *Great Britain*, and is contented and hath agreed to stand to, and bear the adventure of the said sum upon the body of the said ship, during the said voyage), and to and with the executors, administrators, and assigns of the said *C. D.* by these presents: That the said ship, with the first good wind and weather after the day of next ensuing the date hereof, shall depart from the said river *Thames*, on the said intended voyage, and shall, by God's grace, (the perils and dangers of the sea, and restraint of princes and rulers excepted), return into the said river *Thames* from her said voyage before the expiration of fourteen months, to be accounted from the date of these presents; and that the said ship, in her said intended voyage, shall not sail or apply unto any other ports or places than those before mentioned herein, unless she shall be necessitated thereto, by extremity of weather, or other unavoidable accident. And that I the said *A. B.* my executors, administrators, or assigns, shall and will well and truly pay, or cause to be paid, unto the said *C. D.* his executors, administrators, or assigns, at, &c. the sum of 560 *l.* of lawful money of *Great Britain*, in respect of the adventure aforesaid, if the said ship shall go only to the island of *Barbadoes*, and from thence return to *London* to finish her said intended voyage; and the sum of 600 *l.* of like money, if

if the said ship shall go from thence to the island of *May*, and so return again to the said island of *Barbadoes*, and thence to *London* to end her said voyage: and that within one month after the return of the hull or body of the said ship unto the river *Thames*, from her said voyage. PROVIDED ALWAYS, and it is nevertheless the true intent and meaning of these presents, That if the said ship, in her intended voyage, shall happen to be lost, miscarry, or be taken by men of war, or pirates, that then this present writing or deed, and every covenant, payment, matter, and thing therein contained, on the part and behalf of me the said *A. B.* to be done, paid, and performed, shall be void and of none effect: And that then I the said *A. B.* my executors or administrators, shall not be anywise chargeable or liable to pay the said several sums before mentioned, or either of them, or any part thereof, to the said *C. D.* his executors, administrators, or assigns, but that he and they are to lose the same, and every part thereof; any thing hereinbefore contained to the contrary thereof, in any wise notwithstanding. AND it is agreed, by and between the said parties to these presents, that in case the said ship shall not be returned unto the river *Thames*, from the said intended voyage, at the end of fourteen months, to be accounted from the date of these presents; and that, at the expiration of the said fourteen months, there shall not be jult proof made of the loss happening within the time aforesaid; that then, I the said *A. B.* my executors, administrators, or assigns, shall and will, within twenty days next after the end and expiration of the said fourteen months, well and truly pay, or cause to be paid, unto the said *C. D.* his executors, administrators, or assigns, at the place of payment aforesaid, the said sum of 560*l.* in case the said ship shall go unto the said island of *Barbadoes* as aforesaid, and the said sum of 600*l.* in case the said ship shall go unto the said island of *May* as aforesaid; and that the said *C. D.* shall not run the hazard and adventure of the said sum by him adventured as aforesaid, upon the body of the said ship, any longer than fourteen months, to be reckoned and accounted as aforesaid. In witness, &c.

No. V.

Form of a Respondentia Bond, upon an East India Voyage.

KNOW ALL MEN by these presents, that I, *A. B.* of in the county of , mariner, am held and firmly bound to *C. D.* of, &c. in the sum or penalty of 1000*l.* of lawful money of *Great Britain*, to be paid to the said *C. D.* or to his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, I the said *A. B.* do bind myself, my heirs, executors, and administrators firmly, by these presents, sealed with my seal, DATED this 23d day of *January*, in the forty-second year of the reign of our Sovereign Lord *George* the third, by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, and in the year of our Lord 1802.

WHEREAS the above named *C. D.* on the day of the date above written, advanced and lent unto the said *A. B.* the sum of 500*l.* upon the goods, merchandize, and effects laden and to be laden on board the good ship or vessel called *The Saint George*, now riding at anchor in the river *Thames* outward bound, and whereof one *E. F.* is commander. NOW THE CONDITION of this obligation is such, that if the said ship or vessel do and shall, with all convenient speed, proceed and sail from and out of the said river *Thames*, on a voyage to any port or place, ports or places, in the *East Indies*, *China*, *Persia*, or elsewhere beyond the *Cape of Good Hope*; and from thence do and shall sail, return, and come back into the said river *Thames*, at or before the end and expiration of 36 calendar months, to be accounted from the day of the date above written, and there to end her said intended voyage, (the dangers and casualties of the seas excepted); AND if the said *A. B.* his heirs, executors, or administrators, do and shall within thirty days next after the said ship or vessel shall be returned to the said port of *London*, from her said intended voyage, or at and upon the end and expiration of the said thirty-six calendar months, to be accounted as aforesaid, (which of the said times shall first and next happen), well and truly pay, or cause to be paid, unto the said *C. D.* his executors, administrators,

administrators, or assigns, the full sum of 500*l.* of lawful money of *Great Britain*, together with the sum of 12*l.* of like lawful money *per* kalendar month, for each and every kalendar month; and so proportionably for a greater or less time than a kalendar month for all such time, and so many kalendar months as shall be elapsed and run out of the said thirty-six kalendar months, over and above twenty kalendar months, to be accounted from the day of the date above written; Or if, in the said voyage, and within the said thirty-six kalendar months to be accounted as aforesaid, an utter loss of the said ship or vessel by fire, enemies, men of war, or any other casualties, shall unavoidably happen, and the said *A. B.* his heirs, executors, or administrators, do and shall, within six kalendar months next after such loss, well and truly account for (upon oath if required), and pay unto the said *C. D.* his executors, administrators, or assigns, a just and proportionable average on all the goods and effects of the said *A. B.* carried from *England* on board the said ship or vessel, and the net proceeds thereof, and on all other goods and effects which the said *A. B.* shall acquire during the said voyage, for or by reason of such goods, merchandizes, and effects, and which shall not be unavoidably lost; then the above written obligation to be void and of none effect, else to stand in full force and virtue.

Sealed and delivered,
(being first duly stamped)
In the presence of

No. VI.

*Form of a Policy of Insurance upon a Life, for the Life
of the insured, by the SOCIETY FOR EQUITABLE
ASSURANCES UPON LIVES.*

THIS PRESENT INSTRUMENT OR POLICY OF INSURANCE witnesseth, that whereas *A. B.* of _____ in the county of _____ hath entered into and become a member of the society for EQUITABLE ASSURANCES ON LIVES and survivorships, according to a certain deed of settlement bearing date the seventh day of *September*, which was in the year of our Lord one thousand seven hundred and sixty-two, and inrolled in his majesty's court of *King's Bench* at *Westminster*; and whereas the said society, relying upon the truth of a certain declaration, dated this _____ day of _____ made and signed by the said *A. B.* touching the age, state of health, and other circumstances attending the said *A. B.* have assured to the said *A. B.* the sum of _____ pounds, to be paid to his executors, administrators, or assigns, after the decease of the said *A. B.* whensoever the same shall happen; provided the said assured does not exceed the age of _____ years on this _____ day of _____ has had the small-pox, and is not afflicted with any disorder which tends to the shortening of life, (as in the said declaration more fully is set forth), at and under the annual sum or premium of _____

And whereas the said assured hath executed the covenants usually entered into by members of the said society, and hath paid such premium for one whole year, commencing from the date of these presents: Now we, whose names are hereunto subscribed, and seals affixed, being two of the trustees of the said society, do, for ourselves, and our assigns, trustees of the said society, covenant, promise, and agree, to and with the said assured, and the executors, administrators, and assigns of the said assured, that if the said assured, or the assigns of the said assured, shall yearly and every year, during the term of this assurance, continue to pay to the trustees of the said society,

society, or to any two or more of them, the annual sum or premium aforesaid, on or before the day of in every year; and shall observe, perform, fulfil, and keep all and singular the covenants, articles, clauses, provisos, conditions, and agreements, which on the part and behalf of the said assured, are and ought to be observed, performed, fulfilled, and kept, according to the true intent and meaning of the said deed of settlement: We, or our assigns, trustees of the said society for the time being, will or shall, within fix kalendar months, after satisfactory proof shall have been made of the death of the said assured, well and truly pay, or cause to be paid, out of the stock or fund of the said society, unto the executors, administrators, or assigns, of the said assured, the full sum so hereby assured: Provided always, and it is hereby declared to be the true intent and meaning of this policy of assurance, and the same is accepted by the said assured upon these express conditions, that in case the said assured shall die upon the seas, or shall go beyond the limits of *Europe*, unless license be obtained from the court of directors, or shall die by his own hands, or by the hands of justice; or if the age of the said assured does exceed years; or if the said assured be now afflicted with any disorder which tends to the shortening of life; or if the above mentioned declaration contains any untrue averment, this policy shall be void.

In witness, &c.

No. VII.

Form of a Policy of Insurance against Fire.

**By the Corporation of the *Royal Exchange Assurance of Houses*
and Goods from Fire.**

THIS present instrument or policy of assurance witnesseth, that whereas *A. B.* hath agreed to pay into the treasury of the corporation of the *Royal Exchange, London*, for the assurance of from loss or damage by fire. *Now know all men by these presents*, That the capital stock, estate, and securities of the said corporation shall be subject and liable to pay, make good, and satisfy unto the said assured, his heirs, executors, or administrators, any loss or damage which shall or may happen by fire to the said goods aforesaid, (except such goods as hemp, flax, tallow, pitch, tar, turpentine, glass, china, and earthen wares, writings, books of accounts, notes, bills, bonds, tallies, ready money, jewels, plate, pictures, gun-powder, hay, straw, and corn unthreshed), within the space of twelve calendar months from the day of the date of this instrument or policy of assurance, not exceeding the sum of and shall so continue, remain, and be subject and liable, as aforesaid, from year to year, to be computed from the day of in every year, for so long time as the said assured shall well and truly pay, or cause to be paid, the sum of into the treasury of the said corporation, on or before the day of which shall be in each succeeding year, and the said corporation shall agree thereto by accepting and receiving the same; which said loss or damage shall be paid in money immediately after the same shall be settled and adjusted; or otherwise, if the said loss or damage shall not be adjusted, settled, and paid within sixty days after notice thereof shall be given to the said corporation, by the said assured, that then the said corporation, their officers, workmen, or assigns, shall, at the charge of the said corporation, at the end and expiration of the said sixty days, provide and supply the said assured with the like quantity of goods of the same sort and kind, and of equal value and goodness with those burnt or

4

damned

damnified by fire. *Provided always nevertheless*, and it is hereby declared to be the true intent and meaning of this deed or policy, that the said stock, estate, and securities of the said corporation shall not be subject or liable to pay or make good to the assured any loss or damage by fire which shall happen by any invasion, foreign enemy, or any military or usurped power whatsoever. *Provided also*, that this deed or policy shall not take place or be binding to the said corporation, until the premium for one year is paid, or in case the said assured shall have already made, or shall hereafter make any other assurance upon the goods aforesaid, unless the same shall be allowed of and specified upon the back of this policy: Or if the said *A. B.* at the time when any such fire shall happen, shall be in the possession of, or let to any person who shall use or exercise therein the trade of a sugar baker, apothecary, chemist, colour-man, distiller, bread or biscuit baker, ship or tallow chandler, stable keeper, inn-holder, or maltster, or shall be made use of for the stowing or keeping of hemp, flax, tallow, pitch, tar, or turpentine; but that in all or any of the said cases these presents, and every clause, article, and thing, herein contained, shall cease, determine, and be utterly void and of none effect, or otherwise shall remain in full force and virtue. In witness whereof, the said corporation have caused their common seal to be hereunto affixed, the day of in the year of the reign of our Sovereign Lord by the grace of God, of the united kingdom of *Great Britain and Ireland*, King, Defender of the Faith, &c. and in the year of our Lord one thousand eight hundred

N. B. This policy to be of no force if assigned, unless such assignment be allowed by an entry thereof in the books of the company.

GENERAL INDEX.

ABANDONMENT.

| | Page | <i>Abandonment in other cases than capture and arrest of princes.</i> | |
|--|---------------|--|----------|
| <i>NATURE of.</i> | 479 | Upon shipwreck. | ib. |
| Whether coeval with insurance. | ib. | Upon a stranding. | ib. |
| Its probable origin. | 480 | A partial loss cannot be made total by abandoning. | 498, 502 |
| Whether carried too far. | ib. | No injury, however great, is a total loss, if the ship arrive. | 502 |
| <i>In what cases the insured may abandon.</i> | 482, 489 | Or survive the term insured. | 503 |
| Upon what principle. | 482 | But wherever the voyage is lost, the insured may abandon. | 505 |
| In what cases permitted in <i>France</i> . | ib. | Or where the cargo is reduced in value to less than the freight. | 507 |
| <i>Upon capture and arrest of princes.</i> | 483 | <i>Within what time it may be.</i> | 508 |
| When it may be. | ib. 484, 489 | In foreign countries. | ib. |
| When not. | 490, 496 | In <i>England</i> . | 508, 510 |
| When prevented by recapture. | 484, 487, 493 | At what time notice must be given. | ib. |
| The insured is not obliged to abandon. | 489 | Effect of neglecting to give notice. | 513 |
| Whether a loss be total or not, depends on the final event. | 490, 494 | But, till notice of the loss, the acts of the captain will not prejudice the right to abandon. | 509, 511 |
| The <i>jus postliminii</i> continues for ever. | 492 | When the captain shall be deemed the agent of the insurers. | 510 |
| Till abandonment there is no vested right to a total loss. | 494 | What act of the insured will preclude his right to abandon. | 511 |
| A capture does not necessarily make a total loss, nor a recapture prevent it. | 499 | The insurers demanding an abandonment of too much, will not excuse the want of an abandonment. | 512 |
| If the captain purchase from the captors, the sum paid is only a partial loss. | 501 | If they prevent an abandonment, they must pay a total loss. | 513 |
| | | | 515 |
| | | 3 A 4 | When |

- When the insured may abandon upon a presumed loss. 516
- The form of an abandonment.* ib.
- There must be some notice of it. 517
- And this must be explicit. 518
- And unconditional. ib.
- And cannot be for part. ib.
- When a particular article may be abandoned. ib.
- The effect of an abandonment.* 519
- How it transfers the property. ib.
- To what time it relates. ib.
- Whether an abandonment of a ship transfers the freight. 519
- It can only be in proportion to the sum insured. 520
- What shall be the concurrent claims of insurers and lenders on bottomry. ib.
- What shall be the claim of the insurers, where the insured receives compensation after the abandonment. 522
- Or the ship arrives safe. ib.
- Or the thing insured is recovered. 524
- Abandonment once made is irrevocable. 525
- Disposal of the effects abandoned.* 521, 526
- Duty of the insured to save all in his power. 526
- Duty of the captain and sailors. 527
- Upon a valued policy. 532
- Upon an open policy. ib.
- Where the loss consists of one entire individual. ib.
- Where part of the goods are saved. 531
- Where all are damaged. ib.
- Where only one of several articles insured is put in risk. ib.
- Where the policy is free of average under so much *per cent.* 532
- How the loss shall be appreciated* ib.
- What shall be deemed the true value of a thing. ib.
- How averages are settled. 533
- Different modes of appreciating a loss. ib.
- How this is done in *France*. ib.
- In *England*. 534
- The insurer is not to be involved in the rise or fall of the market. 539
- The effect of an adjustment.* 542
- It is *prima facie* evidence against the insurers. ib.
- But it may be impeached. 543
- It may be given in evidence in an action on the policy. 544
- How, in case of abandonment, the claims of different sets of underwriters shall be adjusted. 521

ACCEPTANCE OF BILLS.

When this will give a title to insure. 214

ACTION.

As to the form of action on a policy of insurance. *Vid. Proceedings.*

ADJUSTMENT OF LOSSES.

What shall be deemed a fair indemnity. 497, 529

How the quantity of the loss shall be ascertained. 530

ADMIRALTY.

As to the effect of the sentence of a foreign court of admiralty. *Vid. Warranty, (Neutral property).*

Insurance is a subject of admiralty jurisdiction in other countries. 580

Never so in *England*. ib.

ADMISSIONS.

The necessity of mutual admissions in actions on commercial subjects. 606

AGENT.

His authority. 205

A ship's

- A ship's husband, as such, is not agent for the owners, to enable him to insure. 205
- In what cases an agent is bound to insure for his principal. ib.
- In what case an action will lie against him for negligence. 206
- Even a voluntary agent is liable, if he take any step. ib.
- How the plaintiff shall recover in such action. 209
- But if the agent act in the usual manner, it is sufficient. ib.
- An agent ought not to be an underwriter. ib.
- If he pretend he has effected a policy, trover will lie against him for it. 210
- A general agent may insure without a particular order. 213
- When a man shall be deemed the agent of the insured; when of the underwriters. *Vid. Abandonment.*
- When a general agent may insure in his own name. *Vid. Policy.*
- What shall be sufficient proof of the authority of an agent to underwrite for his principal. 610
- Duty of an agent as to representations made to the underwriters. 337

ALIEN ENEMY.

Vid. Enemy.

ALTERATION.

When a policy may be altered. *Vid. Policy.*

AMALPHITAN CODE.

Vid. Marine Law.

AMERICA.

- Discovery of, its effects on the commerce of *Europe*. 13
- Under what circumstances *Americans* may trade to the *British* settlements in *India*. *Vid. Voyage.*

ANIMALS.

In what case insurers shall be liable for the loss of them. 420

APPORTIONMENT.

When there may be an apportionment of the premium. *Vid. Return of Premium.*

ARBITRATION.

In cases of insurance. *Vid. Proceedings.*

ARREST OF PRINCES.

- What shall be. 434
- Difference between an arrest and a capture. 434, 441
- If the government seize a corn-ship in a famine, this is an arrest. 435
- But if done by a mob of rioters, it is a capture by pirates. 436
- The word *people* means a people or nation, not a mob. ib.
- If a ship be seized, for a breach of the law of nations, this is not an arrest within the policy. 435, 436
- An embargo is always an arrest within the policy. 436
- If a ship, insured "*At and from*," a port, be arrested in the port; this is within the policy. 438
- If a ship be seized after hostilities, this is an arrest. 441

ASSIGNMENT.

How a policy against fire shall be assigned. *Vid. Fire, (Insurance against).*

"AT AND FROM."

How these words shall be construed. *Vid. Risk, (Duration of).*

AVERAGE.

AVERAGE.

Defined. 460
 Different sorts. ib.
 When average contributions may be claimed. 460, 462
 When petty average shall be a charge against insurers. 461, 462
 When the loss of goods put into lighters shall be a general average. 463
 When wages and expences shall be a general average. 464
 What shall be only a particular average. 465
 What shall be liable to contribute to a general average. ib.
 The captain's duty in settling a general average. 466
 Remedy against him for neglecting this. ib.
 How the contribution shall be adjusted. 467
 In what degree the ship and freight are liable. ib.
 How a *jettison* shall be valued. ib.
 How the insurers shall reimburse average contributions. 468
 Whether lenders on bottomry be liable to general average. Vid. *Bottomry*.
 What shall be an average loss within the common memorandum. Vid. *Memorandum*.

AVERMENT.

Of interest. Vid. *Proceedings*, (*Declaration*).
 Of loss. Vid. ib.

BANKRUPT.

How an insured may claim against the estate of a bankrupt insurer. Vid. *Proceedings*, (*Trial*).

BANK SAUL.

Vid. *Rise*, (*On ship*). Vid. *Proceedings*, (*Trial*).

BARRATRY.

Defined

442

In what case insurance against barratry ought to be permitted. 443
 What shall amount to barratry. 445
 Whether the captain may be insured against the barratry of the sailors. 445, 458
 When a deviation shall not be barratry. 447
 Whether the sailors may commit barratry against the will of the captain. ib.
 In what case the disobedience of the sailors amounts to barratry. ib.
 In what case cruising for prize is barratry. 448
 Barratry can only be committed against the owners. 449
 Therefore it cannot be committed by the master if he be owner. 452
 Or even if he have only the equity of redemption. ib.
 A general freighter is owner for the voyage. 454
 The words "*in any lawful trade*" will not exempt the insurers from barratry by *smuggling*. 458
 It is immaterial whether the loss happens during the act of barratry, or after. 459
 But the insurer will not be liable, if it do not happen during the voyage. ib.
 How barratry is punished in France ib.
 How in England. 477
 How barratry shall be proved. Vid. *Proceedings*, (*Proof of Loss*).

BELIEF.

Whether matter of belief amounts to a representation. Vid. *Representation*.

BILL OF HEALTH.

Vid. *Document*.

BILL OF LADING.

Vid. *Document*; *Interest*, (*Qualified*).

BILL OF PARCELS.

Vid. *Document*.

BLOCKADE.

BLOCKADE.

- Commerce with a place blockaded or besieged. 64
 The effect of notification of a blockade. 64, 65
 Whether a great extent of coast may be declared to be blockaded. 65

BOTTOMRY AND RESPON-
DENTIA.

- Nature and form of this contract.* 632
 Distinction between bottomry and respondentia. 633
 Denomination. ib.
 Its antiquity. ib.
 Whether the *Roman nauticum fenus* was materially different from the modern bottomry. 634
 How bottomry differs from a simple loan. ib.
 Analogy between bottomry and insurance. 635
 How they differ. ib.
 Utility of this contract. 636
 Form of it. 637
 The marine interest must be expressly reserved. ib.
 Whether equity would supply the omission. ib.
The parties to the contract. ib.
 Who may lend on bottomry. ib.
 Who may borrow. 638
 When the captain may hypothecate the ship. ib.
 Whether the owners are liable for money taken up by him, in the place where they reside. ib.
 To what extent he may borrow in a foreign country. ib.
 Whether the lender be bound to look to the application of the money. 639
 Whether money may be lent on bottomry to an alien enemy. ib.
The thing hypothecated. 640
 On what things money may be lent ib.
 The borrower may take the money on board with him. ib.
 But the money, or its equivalent, must be exposed to the perils of the sea, at the risk of the lender. 640
 Wagers, in the form of bottomry loans, prohibited in the case of *East India* voyages. 641
 Whether this be a legal contract at common law. 642
 Loans on foreign *East India* ships prohibited. ib.
 Whether money may be lent to a *British* subject on goods on board an *American East India* ship. 643
 In *England*, money may be lent on freight. 644
 Sailors may borrow on their goods on board: not on their wages. 645
 Whether money may be lent on a ship or goods already in risk. ib.
The principal and marine interest. 646
 Of what the loan may consist. ib.
 Upon what principle the marine interest is deemed legal. ib.
 It can only be due where the risk has been commenced. 647
 Till the risk commences, it is a simple loan. ib.
 What allowance the lender shall have, where the risk is not commenced. 648
 At what time the marine interest ceases. 649
 Whether it be legal to contract for so many months' interest, payable at all events. 650
 When common interest begins to run. ib.
The perils or risks to which the lender is liable. 651
 These are nearly the same as in insurance. ib.
 They include piracy and capture. ib.
 But nothing short of a total loss will discharge the borrower. 652
 The lender is not liable for the internal defect of the thing. 653
 Nor for the act of the owner or master. 654
 Nor for smuggling. ib.
 Nor for any loss, if the ship do not sail on the voyage agreed. 655
 Or

Or if she deviate without necessity. 655
 But if she be pressed into the King's
 service, this will excuse a deviation. *ib.*
 Nor is the lender liable, if the ship be
 changed without necessity. 657
 What shall be the duration of the risk. *ib.*

*Whether the lender be liable to general
 average.* 658

By the general law of merchants. *ib.*
 By the law of *England*. 659
 The lender upon a *Danish* ship is liable. 660
 And the insurers on such loan must
 make good the loss. *ib.*

*Whether the lender be entitled to the benefit
 of salvage.* 662

He is entitled to it by statute, upon
East India voyages. *ib.*
 Whether in other voyages. *ib.*
 How bottomry loans shall be insured.
 93, 94, 95, 223, 225
 What remedy the lender shall have
 against the estate of the borrower,
 become bankrupt before the risk
 ended. 631

BROKER.

Vid. Insurance broker.

BULLION.

Whether it may be insured, as goods.
 109, 226, 524
 If clandestinely exported, a policy on
 it will be void. 226

CAPE OF GOOD HOPE.

Vid. Commerce.

CAPTAIN.

Whether his mistake be a risk within
 the policy. 136
 As to his duty in settling averages.
Vid. Average.

As to his duty in case of loss. *Vid.*
Abandonment.
 As to his power of borrowing money
 and hypothecating the ship. *Vid.*
Bottomry.
 As to his duty in the stowage, care,
 and delivery of the goods. *Vid.*
Risk.
 For what losses he shall be liable. *Vid.*
Risk.
 As to naming him in the policy. *Vid.*
Policy.
 When he ought to hire another ship.
Vid. Ship.
 When his disqualification shall avoid
 the policy. *Vid. Ship.*
 How his clothes may be insured. *Vid.*
Policy.

CAPTURE.

What shall be. 422
Vid. Arrest of Princes.
 Whether lawful or unlawful, the in-
 surer is liable. *ib.*
 And whether the property be changed
 or not. 423
 The effect of capture where the insur-
 ance is "*interest or no interest.*"
 424
 The effect of capture and recapture in
 divesting and revesting the property.
 426
 In every case of capture, the insured
 may abandon. 429
Vid. Abandonment.
 The insurers shall defray all fair charges
 occasioned by capture and recapture.
 429
 They are therefore liable for money
 paid to the captors upon a com-
 promise. 430
 In what case the produce of an enemy's
 country, in a neutral ship, shall be
 liable to capture. *ib.*
 How the law now stands with respect
 to the ransoming of captured ships.
 431
 When a recaptured ship may prosecute
 her voyage. 433
 What time is given to the recaptors to
 proceed to judgment. *ib.*
 How

How a loss by capture shall be averred in the declaration. Vid. *Proceedings, (Declaration.)* 226

How such loss shall be proved. Vid. *Proceedings, (Proof of Loss.)*

CERTIFICATE.

As to the certificate from the minister and churchwardens, &c. of a loss by fire. Vid. *Fire, (Proof of Loss.)*

CESTUI QUE TRUST.

In what case he has an insurable interest. Vid. *Interest, (Insurable.)*

CHARTER PARTY.

Vid. *Documents.*

CHANGING RISK.

Vid. *Risk, (Changed.)*

CICERO.

His rule respecting concealment. 353

CHANGING SHIP.

Vid. *Ship.*

"CIVIL COMMOTION."

As to the effect of these words in an insurance against fire. Vid. *Fire, (Risk.)*

CLOTHES.

As to the insurance of the captain's clothes. Vid. *Policy; Proceedings, (Proof of Loss.)*

COIN.

How it may be insured. 226

If clandestinely exported, a policy on it will be void. 226

COLONY, ENEMY'S.

Vid. *Enemy, Commerce.*

COLONIES, BRITISH.

Vid. *Commerce.*

COMMENCEMENT OF RISK.

Vid. *Risk, (Duration of).*

COMMERCE.

Growth of maritime commerce in modern *Europe.* 8
 Causes which contributed to its revival. 9
 Commerce of the *Lombards.* 10
 Of the *Hanseatic League.* 11
 Of the *Flemings and Dutch.* ib.
 Of the *Bruijs.* 12
 How checked in *England.* 13
 In what cases insurance on commerce with the *British* colonies shall be void. 55
 In the case of *East India* voyages. ib.
 Carried on by *British* subjects. ib.
 By foreigners. 59
 As to trading with the enemy. Vid. *Capture, Enemy.*

COMMISSION.

Whether the expectation of commission upon a consignment be an insurable interest. 112

COMPENSATION.

If compensation be made after a loss paid, this shall go to the insurer. 522

CONCEALMENT.

Effect of, whether fraudulent or innocent. 347
 What

What shall be deemed a material concealment. 348

Effect of a concealment by an insurer. 352

What things need not be disclosed. 353

CONDEMNATION, Sentence of.

Vid. Warranty, (neutral).

CONSIGNEE.

When he shall have an insurable interest in the consignment, *Vid. Interest, (insurable).*

CONSOLIDATION RULE.

Vid. Proceedings.

CONTAGION.

Vid. Infection.

CONTINUANCE OF THE RISK.

Vid. Risk, (duration of).

CONTRABAND OF WAR.

The obligations of neutrality. 63

What articles are contraband. ib.

Commerce with places besieged. 64

Insurance of warlike stores sent to the king's enemies. 66

Exported in contravention of an embargo. ib.

Sent to a *British* colony, with which all intercourse is prohibited. 68

Or while in the hands of the enemy. 69

CONTRIBUTION.

Vid. Average.

CONTRIBUTION SOCIETIES.

Vid. Fire, (insurance against).

CONVOY.

Vid. Warranty, (convey).

CORN.

Vid. Memorandum.

CORPORATIONS.

How they contributed to the revival of commerce. 9

COURTS OF EQUITY.

Whether they have any jurisdiction in questions of insurance. 586

COURTS, FOREIGN.

The authority of their sentences.

Vid. Warranty, (neutral).

COURT OF POLICIES OF INSURANCE.

When, and for what reason, erected. 25

Its powers enlarged. 26

Fallen into disuse. ib.

CRUISE.

Cruising in quest of prize, when it shall be barratry. *Vid. Barratry.*

When it shall be a deviation. *Vid. Deviation.*

How a liberty to cruise for a certain time is to be construed. *Vid. Deviation, Letters of Marque.*

CRUSADES.

How they contributed to the revival of commerce. 9

DATE.

As to the date of a policy. *Vid. Policy.*

DECISIONS.

DECISIONS.

Vid. *Judicial Decisions*.

DECLARATION.

For the form of a declaration on a policy. Vid. *Proceedings, (declaration)*.

DEMURRAGE.

When demurrage shall be a loss within the policy. 621

DETENTION OF PRINCES.

Vid. *Arrest of Princes*.

DEVIATION.

Defined. 392

What shall amount to a deviation that will discharge the insurers. ib.

What is meant by the usual course of the voyage. ib.

The smallness of a deviation makes it not the less fatal. 394

The ship must go to all the ports in their order. 395

What is meant by a liberty to touch, &c. 397, 398

In what case cruising in quest of prize, shall not be a deviation. 404

How a liberty to cruise for six weeks shall be construed. 403

When an unusual duration of the voyage shall be deemed a deviation. 405

A deviation is not the less fatal because the risk is not increased by it. ib.

If there be several tracks to the place of destination, the captain should be at liberty to chuse. 407

When a previous design to touch at a place shall only be deemed an intention to deviate. 231

Distinction between an intended deviation, and a different voyage. 232,

406, 407

Whether an intended deviation will discharge the insurers. 406

When a deviation shall be justified by necessity. 402, 408

Stress of weather. 409

Want of necessary repair. 410

Joining convoy. 412

Avoiding an enemy. ib.

A mutiny of the crew. ib.

What degree of necessity will justify a deviation. 413

The voyage of necessity must be performed without deviation. ib.

When a deviation shall amount to barratry. Vid. *Barratry*.

DOCUMENTS.

Those which neutral ships usually require are,

Passport. 317

Sea-letter or sea-brief. ib.

Proof of property. ib.

Muster-roll. 318

Charter-party. ib.

Bill of lading. ib.

Invoices. ib.

Bill of health. 319

Log-book. ib.

But the want of any of these is only presumptive evidence against the neutrality of the ship. ib.

DOUBLE INSURANCE.

How it differs from re-insurance. 115

Though a wager, it is not void. ib.

But the insured can only recover one satisfaction on the several policies. ib.

Those who pay on one, may recover contribution from underwriters on the others. 116, 117, 120

Whether different persons may insure the same thing, and each recover the full value. 119, 121

Whether a second insurer, with notice of a former insurance, be liable for the whole loss. 121

The insured, if required, must declare how much he has insured in the whole. ib.

Vid. *Interst*.

DURATION

DURATION OF THE RISK.

Vid. Risk, (duration of).

EAST INDIA VOYAGE.

Vid. Voyage.

EAST INDIA COMPANY.

Vid. Voyage, Wager.

EMBARGO.

The insurance of a trade carried on in contravention of an embargo is void. 66

When the insured may abandon upon an embargo. 488

Vid. Abandonment.

When an embargo will excuse the non-performance of a warranty. 253

Vid. Warranty.

Whether the expence of wages and provisions during an embargo, be a loss within the policy. 620

EMBEZZLEMENT.

When the owners and master shall be answerable for embezzlement. 157

ENEMY.

How the insurance of enemy's property is restrained by statute. 30

Whether such insurance be good at common law. 31

Opinions of foreign writers. *ib.*

Reasons of policy against it. 30, 36

Lord *Mansfield's* sentiments. 31

Whether the law, in this respect, ought to yield to expedience. 33, 34

An alien enemy cannot maintain an action on a policy on goods, though shipped before the war. 36

Nor can his agent maintain such action, though a creditor. *ib.*

In what case a neutral in partnership with an alien enemy, may insure his interest in the joint property. 38

The court will not grant a new trial to let in the objection of alien enemy. 34

Trading with the enemy without a license is illegal. 70

An insurance on goods bought of the enemy is void. 71

So, if goods be sent to a *British* colony, while in the hands of the enemy. 69

When the produce of the enemy's country shall be liable to capture on board a neutral ship. 430, 431

Whether there shall be a return of premium upon an insurance of enemy's goods. 557

EQUITABLE TITLE.

When it shall be an insurable interest. 9+

EQUITY OF REDEMPTION.

To what purpose the person, having the equity of redemption of a ship, shall be considered as owner. 452

EVIDENCE.

When a foreign judgment shall be conclusive evidence in our courts.

Vid. Warranty, (neutral).

Whether witnesses may prove an usage, as explanatory of a clause in a policy. 404

In what case the usage of one trade may be given in evidence, to shew the practice of another similar trade. 172

Whether an opinion of the meaning of a clause can be received in evidence. *ib.*

When a declaration of the insured, made before a magistrate abroad, may be read in evidence. 381

In what case the captain's protest is evidence. 616

When

When a subsequent underwriter may give in evidence a representation made to the first. 670

The decision of a foreign court is the best evidence of the law of the country. 660

In general, one underwriter cannot be a witness for another. 607

But if the broker be also an underwriter, he may be a witness for the other underwriters. ib.

Vid. *Proceedings, (trial)*.

EXPECTATION.

When a hope or expectation of profit, or of a future interest, shall be an insurable interest. 83

EXPEDIENCE.

Whether it can be the ground of a judicial decision. 32, 33, 34

FACTOR.

When he has a *lien* upon, and may retain a policy of his correspondent. 120

FIRE, (insurance against).

When introduced into *England*. 681

Objections to it. 682

Answered. ib.

Insurance offices. 683

To what duties insurers against fire are subject. ib.

Of the interest of the insured. 684

Necessity of preventing insurance against fire without interest. 685

Several insurances on the same property. ib.

What shall be a sufficient interest. 686

Of the risk. 637

Exception of fires occasioned by extraordinary events. ib.

Meaning of the words "*usurped power*." ib.

Of the words, "*civil commotion*". 688

Duration of the risk for the 15 days after the time insured. 695

Of the assignment of the policy. 696

How the policy shall be assigned. ib.

Upon a death. ib.

Upon a transfer of the property insured. 697

Difference between the contribution societies and the other offices, as to the assignment. 696

There can be no assignment without the consent of the office. 699

If the insured gratuitously undertake to get the policy assigned, an action will lie against him for neglecting to do so. 207

Of the proof of the loss. 704

Account, affidavit, and certificate ib.

The necessity of this proof. 705

Nothing will excuse the want of it. ib.

The printed proposals requiring it, are a part of the contract. 706

And the procuring the certificate is a condition precedent. 707

FIRE, (loss by).

If this be accidental, it is within the policy. 421

Whether it be so, if it be occasioned by the fault of the master or mariners. ib.

If a ship be burnt to prevent infection, this will be a loss within the policy. ib.

So, if the master set fire to the ship to prevent her falling into the hands of the enemy. 422

FISHING TACKLE.

Whether this be included in a policy on a *Greenland* whaler. 626

FLEMINGS, (commerce of):

Ruined by *Philip II.* 11
Transferred

Transferred to *England* and *Holland*. 14

FOREIGN JUDGMENT.

When conclusive evidence in our courts,—*Vid. Warrantry, (neutral)*.
The *French* pay no regard to the judgments of foreign tribunals. 288

FOREIGN SHIPS.

The restrictions of the 19 G. II. c. 37, do not extend to foreign ships. 105
But the clause against *re-insurance*, does extend to them. 113
Vid. Wager, Re-insurance.

FORT.

Whether the governor of a fort abroad may insure it against capture. 75, 357
Vid. Interest.

FOUNDERING AT SEA.

Vid. Perils of the sea, (Loss by).

FRANCE.

Vid. Foreign judgment; Warranty, (neutral).

FREIGHT.

In *France* freight not already earned, cannot be insured. 75
In *England*, freight expected, as well as the ship, may be insured. 76
But it can only be insured by one who has a legal or equitable title to the ship. 93
Vid. Interest, (insurable).
The insurers on goods are in no case liable for freight. 627, 628
How a part owner of a ship may insure freight. 629
Vid. Proceedings, (proof of loss).
What shall be the duration of the risk on freight. *Vid. Risk, (duration of)*.

A loss on freight can only be claimed where the risk has commenced. 76
As to the duration of the risk on freight, *Vid. Risk, (duration of)*. 192
As to the effect of an abandonment of freight. *Vid. Abandonment, (effect of)*. 519

FRUIT.

When the insurer shall be liable for a damage to fruit. *Vid. Risk, (Memorandum)*. 150

FURNITURE.

Vid. Tackle.

GAMING.

Vid. Wager.

GENERAL AVERAGE.

Vid. Average.

GOOD FAITH.

Ought to preside in all commercial transactions. 334

GOODS.

What may be insured under this denomination. 222

GOODS LASHED TO THE DECK.

How insured. 225

GOVERNOR.

Vid. Fort, Interest.

HAN-

- HANSEATIC LEAGUE.**
Vid. Commerce.
- HEALTH, (warranty of).**
Vid. Lives, (insurance upon). 697
- HOPE.**
Vid. Expectation.
- HUSBAND, (ship's).**
Vid. Agent.
- HYPOTHECATION.**
Vid. Bottomry.
- JETTISON, or JETSON.**
Vid. Average.
- JEWELS.**
 How they may be insured. 226
 If clandestinely exported, a policy on them will be void. *ib.*
- JOINT INSURANCE**
Vid. Insurance Companies.
- JUDICIAL DECISIONS.**
 Their authority in the law of insurance. 23
- JUS POST LIMINII.**
 By the *English* law continues for ever. 492
- INDIA COMPANY.**
Vid. East India Company. 3 B 2
- INDEMNITY.**
 What shall be deemed a fair indemnity. 529
- INFANT.**
Vid. Lives, (Interest).
- INFECTION.**
 If a ship be ordered to be burnt, to prevent infection, whether the insurers be liable. 421
- INQUIRY. (Writ of).**
 What evidence is sufficient upon a writ of inquiry. 105
Vid. Proceedings.
- INSURANCE.**
 Defined. 1
 Abuses of, restrained. 2
 Utility of maritime insurance. 3
 Whether its origin can be traced. *ib.*
Cleirac's account of its origin. 4
 The offspring of maritime commerce. *ib.*
 Whether known to the ancients. 5
 Supposed to have been first practiced in *Italy*. 10
 When introduced into *England*. 11
 Not mentioned in the ancient sea-laws. 17
 Law of, a branch of marine law. 18
 Brought into *England* by the *Lombards*. *ib.*
 The materials from which this law is collected. 18, to 24
 Questions of insurance should not depend on subtleties. 497
- INSURANCE BROKER.**
 Nature of his dealings. 203
 Account between him and each underwriter. *ib.*
 Though the premium be due from him, the loss is due to the insured. 204
Vid. Agent.

If he employ another broker, he is answerable for not furnishing him with all his instructions. 208
 To what extent he shall be so answerable. ib.
 The broker ought not to be an underwriter. 209, 608
 If he should, he may nevertheless be a witness for the other underwriters. 207
 If he pretend that he has effected a policy, his employer may maintain trover against him for it. 210
 His duty, as to representations made to the underwriters. 337

INSURANCE COMPANIES.

Their establishment. 40
 Have an exclusive right to insure ships and goods upon a joint capital. ib.
 How other companies are restrained from insuring as such. 41, 42
 But the privileges of the *East India* and *South Sea* companies are reserved. 43
 One partner cannot recover from another, his proportion of losses incurred upon a joint insurance. 42
 Nor can he recover, even from the broker, the share of a loss received by him from the other partner. 43
 Nor can the ostensible underwriter recover the profits from the broker, on the ground that the partnership was illegal, and he the sole insurer. 44
 But the contract is not void as between the ostensible underwriter and the innocent insured. 45
 In what cases an insurance upon a joint capital is good. 45, 46
 How the common memorandum in their policies differs from that of private underwriters. 140
 Vid. *Memorandum*.
 These companies may make agreements for insurances upon unstamped labels. 244
 In what form of action they must be sued. 596
 Vid. *Proceedings*. (*Declaration*).
 How they may plead. 600
 Vid. *Proceedings*. (*Plea*).

INSURANCE AGAINST FIRE.

Vid. *Fire*.

INSURANCE UPON LIVES.

Vid. *Lives*.

INSURED.

What persons may be insured. 30
 Whether an alien enemy may be insured, vid. *Enemy*.
 As to inserting the name of the insured, his agent, or trustee, in the policy. 212

INSURERS.

What persons may be insurers. 39
 Individual underwriters. ib.
 Character of the *French* underwriters. ib.
 Character of the *English*. ib.
 The borrower upon bottomry cannot be an insurer upon the loan. 95
 What an insurer is presumed to know respecting the trade he insures. 182
 Vid. *Concealment*, *Insurance companies*.

INTEREST.

What shall amount to an insurable interest. 80
 Qualified property. 81
 In what case different persons may each insure the same thing for its full value. ib.
 When the indorsement of a bill of lading gives an insurable interest. ib.
 In what case the indorser still retains an insurable interest. ib.
 How far an expectation of profit, or of a future interest is an insurable interest. 83, 92, 219
 In what case captors have an insurable interest in a prize. 84
 Whether trustees for the care and disposal of ships and goods, under the direction

direction of third persons, have an insurable interest. 85
 Whether a trustee, a consignee, or prize agent, may insure. 89
 A debt which gives a *lien* on the thing insured is an insurable interest. 218
 Whether an insurance without interest be a legal contract at common law. 88
 In what cases it is necessary to aver interest in the declaration. 90
Vid Proceedings. (Declaration).
 When a mere *ceglui que trust* may insure. *ib.*
 In what case a general agent may insure, in his own right. 91
 An insurable interest can only be founded on a legal or equitable title. *ib.*
 A joint purchaser of a ship, whose name is not inserted in the register, has neither title. *ib.*
 The lender on bottomry has an insurable interest in the sum lent. 93
 The borrower has an insurable interest in the surplus value of the thing hypothecated. 94
 But the usage of a particular trade may vary this rule. *ib.*
Vid. Wager, Re-insurance, Double Insurance.
 When there shall be a return of premium, for want of interest in the insured. *Vid. Return of premium.*

"INTEREST OR NO INTEREST."

Vid. Wager.

INTEREST, (Proof of).

Vid. Proceedings. (Trial).

INVOICE.

Vid. Documents.

LANDING OF GOODS.

Vid. Shipping and landing goods.

LAW OF MERCHANTS.

A branch of public law. 18

LAW OF NATIONS.

Defined. 306
 No individual state can add to the law of nations, by its own ordinances. 328
 This law is the rule for deciding questions of prize. 329
 Alterations by treaties, affect only the parties to such treaties. 333

LEE, (Lord C. J.):

Observations on his decisions in questions of insurance. 28

LETTERS OF MARQUE.

If a ship, insured as a private trader, take letters of marque, this will discharge the insurers. 194
 Otherwise, if the letters of marque be taken merely to entice seamen to enter, and without any design to use them 195
Vid. Risk. (Changing).
 If a ship, having letters of marque, cruise in quest of prize, this will be a deviation. 402
 If she have liberty to cruise for 6 weeks, this means 6 successive weeks. 403
Vid. Deviation.

"LIBERTY TO CRUISE."

If a ship have liberty to cruise for 6 weeks, this means 6 successive weeks 403
Vid. Risk, (duration of).

"LIBERTY TO TOUCH, STAY, &c."

How this clause shall be construed. 396

Vid Deviation.
 3 B 3

How in the case of an *East India* voyage.

185

Vid. *Risk*. (*Duration of*).

LIEN.

When this shall amount to an insurable interest.

218

Vid. *Fuñor*.

LIGHTERS.

When the loss of goods put into lighters shall be a general average.

463

Vid. *Average*.

When the risk continues on goods in lighters employed to land them.

167

When not.

ib.

Vid. *Risk*, (*duration of*).

LIVES, (insurance upon).

Nature of this contract.

664

Utility of it.

ib.

Companies for this species of insurance

665

Legality of.

ib.

Warranty of the health and age of the life insured.

667

How made.

ib.

The person's having a particular infirmity, will not falsify it.

ib.

If there be no such warranty, the insurer takes all the risk.

670

Vid. *Evidence*.

Interest of the insured in the life insured.

672

Insurance upon lives, without interest, prohibited.

ib.

In what case a creditor has an insurable interest in the life of his debtor.

673

It must be a legal debt.

675

The insurer cannot object the infancy of the debtor.

ib.

A trustee may insure for his *cestui que trust*.

676

Risk which the insurer runs.

677

The loss must always be total.

667

What are the usual exceptions, where the party insures his own life.

ib.

To make the insurers liable, not merely the cause of the death, but the death itself, must happen within the time limited.

175, 677

If the policy be *from the day of the date*, that day is excluded.

678

Reason why so few litigated questions have arisen upon this contract.

679

Return of premium.

576, 680

Remedy of the insured against the estate of a bankrupt insurer.

ib.

LOG-BOOK.

Vid. *Documents*.

LOMBARDS.

Vid. *Commerce*.

LONDON ASSURANCE.

Vid. *Insurance Companies*.

LOSS.

Total loss.

414

Partial loss, to ship.

415

to goods.

ib.

As to what shall amount to a total or a partial loss,—Vid. *Abandonment*.

What losses are not within our policies.

237

If a loss be within the *general words*, the insurer will be liable, unless he can shew that it arose from a peril not meant to be insured against.

181

What shall be a loss within the policy.

Vid. *Proceedings*. (*Declaration*).

Within what time a loss must happen, to make the insurers liable.

Vid.

Risk, (*duration of*).

Of loss by average contributions.

Vid.

Average.

By barratry.

Vid. *Barratry*.

By capture.

Vid. *Capture*.

By arrest of princes.

Vid. *Arrest of Princes*.

OF

- Of loss by running foul. Vid. *Running foul*.
 By fire. Vid. *Fire*, (loss by).
 By perils of the sea. Vid. *Perils of the Sea*.
 By expence of salvage. Vid. *Salvage*.
 How a loss shall be averred in the declaration. Vid. *Proceedings*, (*declaration*).
Wilful and fraudulent losses. 475
 Offence of piracy, how punished by the law of *England*. ib.
 Destroying any *ship*, to the prejudice of the owners of the ship or goods on board, is felony. 477
 Casting away, burning, or destroying any ship, to the prejudice of the underwriters or owners of goods, is capital. ib.
 The benefit of clergy is taken from such offenders in all cases. ib.
 As to proof of a loss. Vid. *Proceedings*, (*trial*).

" LOST OR NOT LOST."

- This clause is in all our policies. 237
 It is not peculiar to them. ib.
 The reasons for inserting it. 238
 It does not make the contract a *wager*. ib.
 Nor more hazardous. ib.

LOUIS XIV.

- As to his famous ordinance, Vid. *Marine law*.

MANSFIELD, LORD.

- Celebrity of his judgments in insurance causes. 28, 29

MARINE INTEREST.

- Vid. *Bottomry*.

MARINE LAW.

- History of. 14
Rhodian law. ib.

3 B 4

- Amalphytan code*. 15
Consolato del mare. ib.
 Laws of *Oleron*. 16
 Laws of *Wysbuy*. ib.
 Ordinance of the *Hanseatic League*. 17
 Ordinance of the marine of *Louis XIV*. 18

MARKET.

- The rise or fall of the market does not affect the insurer. 539
 Vid. *Adjustment*.

MASTER.

- Vid. *Captain*.

MEMORANDUM.

- What risks shall be excluded by the common memorandum. 138
 Purport of it. 138, 139
 When introduced into policies. 139
 For what purpose. ib.
 Form of it. ib.
 Altered in the policies of the two insurance companies. 140
 Construction of the words "*free of average, unless general, or the ship be stranded*." 141
 Held that they make a *condition*. ib.
 Held that they make an *exception*. ib.
 Whether the insurers be liable for a total loss on the enumerated articles. 145
 Whether, upon a *stranding*, they are put in the same situation as other commodities. ib.
 To what species of loss the insurers are liable upon the enumerated articles. 148
 What shall be a loss by *stranding* within the memorandum. 149
 In what case the insurers shall be liable for a partial loss upon the enumerated articles. ib.
 It is now settled that a *stranding* is a condition, and lets in all partial losses. 150, 152
 Whether the memorandum excludes the total loss of an entire individual. 155
 Vid. *Rijk*.

MIS-

MISREPRESENTATION.

Vid. Representation.

MISSING SHIP.

When a missing ship shall be presumed lost. *Vid. Perils of the Sea.*

MISTAKE.

Whether the insurers are liable for the mistake of the master. 136

MONEY.

How it may be insured. *Vid. Coin.*
 Bringing money into court. *Vid. Proceedings. (plea).*
 When money shall contribute to a general average. 466

MONEY HAD AND RECEIVED.

When a count upon this is necessary in the declaration. *Vid. Proceedings, (declaration).*

MONOPOLIES.

Their effect on commerce, till abolished by statute. 13

MOORED (in safety).

When a ship shall be said to be moored in safety. *Vid. Risk, (duration of).*

MORTGAGE.

In what case the mortgagor of a ship shall be deemed the owner. 452
 When a mortgage shall be sufficient proof of interest. 613

MUSTER ROLL.

Vid. Documents.

MUTINY.

When a mutiny of the crew will excuse deviation. 413

What shall be a loss by mutiny of slaves. 617

Vid. Abandonment, Deviation.

NAVIGATION LAWS.

Vid. Voyage.

NEW TRIAL.

The court will not grant a new trial, to let in the objection of alien enemy. 34

A new trial is generally granted with more facility in questions of insurance than in any others. 605

NECESSITY, (Voyage of).

Vid. Deviation.

NEGRO SLAVES.

Vid. Slaves, Risk.

NEUTRAL.

In what case a neutral, though partner with an alien enemy, may insure 38
Vid. Enemy.

Obligations of neutrality. 63
 The right of visitation and search of neutrals vindicated. 65, 306

In what case the produce of an enemy's country may be captured in a neutral ship. 430

Of the warranty that the thing insured is neutral property. 286

Vid. Warranty, (neutral).

OEEERON, (Laws of).

Vid. Marine law.

OPEN POLICY.

Vid. *Policy*.

OPINION.

Vid. *Evidence*.

ORDINANCES.

Vid. *Marine law, Insurance*.

OVER INSURANCE.

Vid. *Interest, Return of Premium, Double Insurance*.

OWNERS.

To what risks they are liable. Vid. *Risk, (Owners liable)*.

PARTIAL LOSS.

Vid. *Loss, Abandonment*.

PARTNERS.

Insurance by. Vid. *Insurance Companies*.

PASSPORT.

Vid. *Document*.

PEOPLE.

This word means a people or nation, not a lawless rabble. 436

Vid. *Arrest of Princes*.

PERILS OF THE SEA.

How these words are understood in insurance. 416

They comprehend every species of sea-damage. ib.

Foundering, stranding, striking against sunken rocks. ib.

When a missing ship shall be presumed to have foundered at sea. ib.

What shall be a loss by capture, and not by perils of the sea. 418

It is not a loss by perils of the sea, if slaves be thrown overboard from scarcity of water. ib.

Or die for want of food, occasioned by the unusual length of the voyage. 419

If a ship be destroyed by worms, this is not a loss by perils of the sea. ib.

Nor where a ship is damaged by the ordinary service she is engaged in. 420

What loss of animals is within the policy. ib.

PETTY AVERAGE.

Vid. *Average*.

PIRACY.

If a mob of rioters board a ship, and occasion a stranding, this is a loss by pirates. 593

How piracy is punished by the law of England. 475

PLAGUE.

Vid. *Infection*.

POLICY.

Nature and different sorts of policies 198

Denomination. ib.

Different sorts. 199

How the value in a valued policy shall be ascertained. 209

Effect of the valuation. ib.

How a valued policy differs from a wager. 201

The value is only *prima facie* evidence of the interest, and may be disputed. ib.

The principal difference between an open and a valued policy, is in the case of a total loss. 203

How and by whom it may be effected. ib.

It is usually effected by an insurance broker. ib.

Vid. *Insurance Broker*.

When effected, the insured may maintain trover for it. 209

Even where an agent pretends he has effected a policy, trover will lie for it. 210

Vid. *Agent*.

Form

- Form and requisites of a policy.* 211
 When the present form was introduced. *ib.*
 How it ought to be interpreted 211, 212
 Occasional clauses. *ib.*
 The requisites of a policy are,
 1. *The name of the insured, his agent or trustee.* *ib.*
 Policies in blank are prohibited. 213
 In whose name a policy may be. 214
 When the name of the broker will be sufficient. 219
 2. *The names of the ship and the master.*
 When the ship named may be changed. 220
 When an insurance may be on *ship or ships.* *Vid. Ship.*
 The species of vessel must be mentioned. 221
 3. *The subject matter of the insurance* 222
 It may be on goods generally, or the goods may be specified. 223
 Bottomry loans must be described as such. *ib.*
 Unless the usage of a particular trade should make an exception. 225
 What things shall be comprehended under a general policy on goods. 225
 What not. 225, 226
 What is included in an insurance on a ship. 227
 4. *A description of the voyage.* *ib.*
 The description of the voyage has a direct reference to all the circumstances attending it. 182
 If a blank be left either for the port of departure or of destination, the policy will be void. *ib.*
 How the commencement and end of the risk shall be specified. *ib.*
 If for a term, it must not exceed twelve months. 228
 It must not be calculated to induce a false conclusion *ib.*
 If the ship sail on a different voyage from that mentioned, the insurers will be discharged. 230
 Distinction between an intended deviation, and a different voyage. 232
 If the ship be to take any particular course it should be specified. 233
 5. *The perils insured against.* 233
 What perils are not within the general words. 237
 Of the clause "*lost or not lost.*" *ib.*
 6. *The powers of the insured in case of misfortune.* 239
 7. *The promise of the insurers, and receipt for the premium.* *ib.*
 Why the receipt is part of the policy. *ib.*
 8. *The common memorandum.* 240
 9. *The date and subscription.* 241
 How the names are subscribed. *ib.*
 10. *The stamp.* 242
 The stat. 35 Geo. III. c. 63. imposes on marine policies, a stamp-duty of 2 s. 6 d. *per cent.* on the sum insured. *ib.*
 When the premium does not exceed 10 s. *per cent.*, the duty is 1 s. 3 d. *ib.*
 Or it may be 2 s. 6 d. for every 200 l. 243
 In what case, upon an over insurance, the excess of duty will be allowed. *ib.*
 What contract shall be deemed a policy. *ib.*
 No policy on a ship to be for a longer term than twelve months. *ib.*
 No insurance to be available in law, unless stamped; and no policy to be stamped after written or printed. *ib.*
 Penalties for effecting or contracting for any insurance unless stamped. *ib.*
 Penalties on the broker for negotiating such insurance. 244
 Penalty for insuring without a stamp. *ib.*
 In what case the two insurance companies may make agreements on unstamped labels. *ib.*
 When an alteration may be made in the policy. *ib.*
 By 41 Geo. III. c. 10. all the above duties are doubled. 245
 When the policy may be altered or corrected. *ib.*
 What will authorise an alteration. *ib.*
 When the court will order it. 246
 In

In what case this may be done after a loss. 246

When a court of equity will direct an alteration. ib.

When it shall be in pursuance of an agreement. 247

How a policy shall be construed. 164

POLICY BROKER.

Vid. *Insurance broker*.

PREMIUM.

Why the receipt for the premium is always a part of the policy. 239

An action will lie for it notwithstanding the receipt. 240

The non-payment of it will not affect the validity of the contract. ib.

Vid. *Insurance Broker, Policy, Return of Premium*.

PORT OF DISCHARGE.

Where there are several ports of discharge, in what order they must be taken. Vid. *Deviation, (what shall be)*.

PRESUMPTION.

When a ship shall be presumed to be lost. 416

PRIVATEER.

May be insured, "*interest or no interest*." 104

Entitled to what salvage upon recaptures. 473

PRIZE.

When a prize may be insured by the captors. Vid. *Interest, (insurable)*. Vid. *Warranty, (neutral)*.

PRIZE AGENT.

When he shall have an insurable interest in a prize. Vid. *Interest, (insurable)*.

PROCEEDINGS.

When actions at common law were first brought on policies. 24

History of the court of policies of insurance. 25

In what courts actions on policies may be brought. 585

Courts of common law. ib.

Courts of equity have no jurisdiction. 586

The effect of an agreement to submit to arbitration. ib.

The declaration. 587

What is the proper form of action. ib.

Against private underwriters. ib.

Against the two insurance companies. 596

Form of declaring against them. ib.

Heads of a declaration. ib.

Count for money had and received 588, 597

It is not necessary to declare specially upon an adjustment. Vid. *Adjustment*.

How the interest shall be averred. 589, 590, 591

How the loss shall be averred. 591, to 595

When the venue may be changed. 597

The plea, and bringing money into court. ib.

In what cases the general issue is the proper plea. ib.

Instance of a special traverse. ib.

What may be given in evidence under the general issue. 598

When the insured may be called upon to declare how much he has insured. 599

When the defendant may plead a tender. ib.

When he shall bring money into court. ib.

On what count. 600

Whether alien enemy ought to be specially pleaded. ib.

How

- How the two insurance companies shall plead. 600
- Of the consolidation rule.* 602
- The necessity of consolidating actions. *ib.*
- This was done formerly in courts of equity. *ib.*
- First attempt to consolidate in a court of law. 603
- Nature of the rule. 604
- Mutual admissions. *ib.*
- Terms imposed on each party. *ib.*
- Benefits refusing from this rule. 605
- When the suing out a writ of error will be a breach of this rule. 606
- Of the trial.* *ib.*
- What must be proved by the plaintiff. *ib.*
1. *The contract.* *ib.*
- Whether parol evidence can be received to prove an agreement inconsistent with the policy. *ib.*
- Whether an usage explanatory of a clause may be proved. 609
- What shall be sufficient proof of the authority of an agent to underwrite for his principal. 610
2. *Payment of the premium.* *ib.*
3. *Interest of the insured.* 611
- What shall be sufficient proof of interest. *ib.*
- Upon a general averment of interest. 612
- Upon a valued policy. *ib.*
- Upon goods. 613
- Upon bottomry loans. *ib.*
- How a bottomry bond shall be proved. *ib.*
- Whether, upon a writ of inquiry, the plaintiff shall be obliged to prove interest. 105
4. *Compliance with warranties.* 614
5. *The loss.* 615
- Upon a ship. *ib.*
- Upon goods. *ib.*
- By capture. 617, 619
- By detection of people. 617
- By barratry. 595, 617
- What loss may be proved within a policy on slaves. *ib.*
- When the payment of salvage may be proved. 619
- The loss proved must be an immediate consequence of the cause alleged. 620
- In what case wages and provisions shall be a loss within the policy. 620, 621, 626
- How a ship's provisions are protected by the policy. 622
- What shall be within the protection of the policy, as part of the ship and furniture. 626
- Whether an insurer on goods be liable for freight. 627
- How the plaintiff shall recover. 629
- What remedy the insured shall have against the estate of a bankrupt insurer. 631
- PROFIT.
- Whether the expectation of profit be an insurable interest. 78, 83, 111
- Whether money may be lent on bottomry, or profit. 644
- PROHIBITED GOODS.
- Vid. Smuggling.*
- PROTEST.
- Vid. Evidence.*
- PROVISIONS.
- How a ship's provisions are protected by the policy. 622
- In what case the consumption of provisions shall be a loss within the policy. 620, 621, 626
- Vid Proceedings. (Proof of loss).*
- QUARANTINE.
- When the risk on a ship shall continue during quarantine. 176
- RANSOM.
- Vid. Capture, Abandonment.*
- How the law with respect to the ransoming captured ships now stands. 431

RATS.

When the owners and master are liable
for injuries by. 157

REGISTER.

Whether a person can have a legal or
equitable title to a ship without being
named in the register. 93
Vid. *Ship, Interest*.

RE-INSURANCE.

What is meant by re-insurance. 112, 114
To whom there insurer is responsible. 113
In what case permitted. ib.
The law restraining it extends to fo-
reign ships. 113, 114

RENDEZVOUS.

Vid. *Warranty*. (*Convoy*).

REPAIRS.

Vid. *Average, Proceedings*. (*Proof of
loss*).

REPRESENTATION.

*What shall amount to a material repre-
sentation.* 335

When a misrepresentation will avoid
the contract. ib.
If made without knowing whether
true or false. ib.
If the person making it believe it to be
true. ib.
If stated only as *belief*. 336
Or *expectation*. ib.
Difference between a representation
and a warranty. ib.
Duty of agents and brokers as to the
representations made by them. 337
Their responsibility for any repre-
sentation made without authority. 338
How far a representation to the first
underwriter is a representation to all.
4 338, 670

Whether a computation stated as fact
will avoid the policy. 338

When a misrepresentation avoids the
contract. 339

*When a representation shall be deemed suffi-
ciently true.* 341

It is sufficient if it be true in substance. ib.
A misrepresentation will not avoid the
policy, if the insured was not de-
ceived by it. 343

RESPONDENTIA.

Vid. *Bottomry*.

RETURN OF PREMIUM.

Where the contract is void ab initio. 549

1. *For want of interest.* ib.

Upon an over-insurance. ib.
But there shall be no return upon a
wager policy. 550

Unless the contract be rescinded while
it is executory. 552

There shall be no return upon a re-
insurance. 553

Upon what principle the premium shall be
retained upon a void policy. 553, 554

2. *Being upon a trading with the enemy.* 556

Though the insurance in such case is
void, there shall be no return. ib.

But where no fraud is imputable to
the insured, he shall have a return. 557

In what case the plaintiff may take a
verdict for the premium. 558

3. *Where there is fraud on the one side
or the other.* 559

On the part of the insurer. ib.

On the part of the insured. 559, 560, 562

Where the risk has not been commenced
563

Whether this may be when it pro-
ceeds from the act of the insured.
563, 564

Where

Where the voyage is divisible 564
Upon an insurance "at and from." 567, 576

In what case usage will warrant an apportionment of the premium. 569

When a contingency will divide the risk. ib.

Where the risk is entire. 571

Where the premium is entire. 573

Where the insurance is for a term. 574

Upon an insurance on a man's life. 576

When the premium is computed at so much per month. 577

Upon the performance of some stipulation. 579

As, upon the ship's sailing with convoy and arriving. ib.

Reason of this stipulation. 580

The meaning of the words "and arrives." 581

What arrival will entitle the insured to a return. ib.

What shall be a sailing with convoy within the stipulation. 266, 583

Of the deduction of one-half per cent. upon a return. ib.

REVERSIONER.

How a fire-policy shall be assigned to the reversioner. 696

RHODIANS.

Vid. *Marine law*.

RIGGING.

Vid. *Tackle*.

RIOTS.

Whether the riots of 1780 were a civil commotion, within the exception of a fire policy. 688

RISK.

Against what risks marine insurances may be legally made. 131

Not against the fault of the insured. ib.

Whether against the mistake of the captain. 136

Not against any risk upon illegal commerce. ib.

As to the risks against which slaves may be insured. Vid. *Slaves*.

What risks are within the common policy. 137

What are excluded by the common memorandum. Vid. *Memorandum*.

To what Risks the owners and master of the ship are liable 156

Damage occasioned by the fault of the ship. ib.

Bad stowage, wet, theft, embezzlement, rats, &c. 157

They are answerable for theft, though all precaution, be taken. ib.

Whether they are answerable for accidents in shipping and landing of goods. 159

To what extent they are liable. ib.

At common law. ib.

By statute. 160

But the insurers, as well as the owners and master, are liable for external theft. 161

What shall be the duration of the risk. ib.

Upon goods. 162

In England. ib.

In other countries. ib.

On board the same ship. ib.

Removed to another vessel. ib.

On board a store ship. 163

When the risk continues on goods bought with the proceeds of the goods saved, in a new ship 377

How long it continues in the port of delivery. 164, 169

In the lighters of the insured. 165

In common public lighters. 167

Where

- Where the goods remain on board longer than usual. 169
- Where the cargo is sold without unloading. 170
- Where the general rule is controlled by a particular usage. ib.
- Every underwriter is presumed to know the usage of the trade he insures. 172
- The usage of one trade may be given in evidence to shew the practice of another similar trade. ib.
- Where the liberty is, "to touch and stay" only. 187
- Whether sailing from *A.* for *B.*, which is an integral part of a voyage from *A.* to *D.*, be a commencement of the risk from *A.* to *D.* 188
- Whether the risk continues, though the ship do not touch at the places in their proper order. 191
- Where a ship has liberty to cruise for a certain number of weeks. 403

Upon freight. 192

When it commences. ib.

If part of the goods be shipped. ib.

If the ship be lost in her way to the port of loading. 193

Whether the risk may be changed. ib.

Effect of changing the risk. ib.

In what case the taking of letters of marque on board will discharge the underwriters. 194

RISK, (Duration of).

Upon the ship. 172

Commencement and end of the risk on the ship. ib.

In *France*. 173

In *England*. ib.

Where the insurance is from a place. 173

Where it is *at and from* a place. ib.

Where it is "*at and from*" an island like *Guadaloupe* or *Jamaica*. 259

Objections to the time of ending the risk on the ship, in *English* policies. 173

Whether insurers are answerable for any loss after the 24 hours, or the end of the term. 174, 175

Where the cause of the loss existed before. ib.

In what case the risk continues during quarantine. 176

During an embargo. ib.

At what time the risk ends, when a ship is insured from *A.* to *B.* generally. 177

Where a ship is insured to *Jamaica* generally. ib.

Where a ship discharges part of her cargo, and is chartered for another voyage, in which she is to deliver the rest of her cargo. 178

When the insurance is to the *West Indies* generally. 179

On the tackle and rigging landed during a repair. 180

During an *East India* voyage. 182

With liberty "*to touch, stay, and trade at any ports and places.*" 185, 186

What is meant by "*any ports and places.*" 186

ROBBERY.

When the captain is answerable for a robbery. *Vid. Risk. (Owners liable).*

ROMANS.

Whether they were acquainted with insurance. 5

To what extent they carried navigation. ib.

ROYAL EXCHANGE ASSURANCE.

Vid. Insurance Companies.

RUMOUR.

Whether doubtful rumours ought to be disclosed to the insurer. 351

Vid. Concealment.

RUNNING FOUL, (Loss by).

When insurers are liable for such loss. 420
Their

Their remedy against the master of the vessel in fault. 421

SAILING.

Warranty to sail by a given day. 253
Vid. *Warranty*.

SAILING INSTRUCTIONS.

Vid. *Warranty*. (*Convoy*).

SAILORS.

Duty of, in case of misfortune. 528
Wages of, when a charge on the insurers. 464, 620
When entitled to their wages. 73
They cannot insure their wages. 74
But they may insure goods purchased with them. 75

SALVAGE.

What. 469
Of the *lien* for salvage at common law. ib.
What reward is provided by statute for persons employed in the salvage of ships, &c. 470
How secured. ib.
How adjusted where the parties disagree. ib.
How the effects saved shall be disposed of. ib.
Reward of persons *not employed* 471
Who may employ persons in the salvage of ships, &c. ib.
By whom the quantum of salvage shall be adjusted. 472
How money shall be raised on the effects saved, if the salvage be not paid. ib.
How salvage upon a *recapture* is regulated by the marine law. 473
How by statute. ib.
If recaptured by *men of war*. ib.
By privateers. ib.
By both jointly. ib.
If the captured ship be set forth as a *ship of war*, she shall be prize. 474

The insured need not declare specially for salvage. 474, 525, 619
Vid. *Proceedings*. (Proof of loss).
How regulated in the case of recaptured *neutrals*. 474
How the insured must shew his title to recover for salvage. 475
If the salvage be very high, the insured may abandon. ib. 482
Whether a lender on bottomry be entitled to the benefit of salvage. Vid. *Bottomry*.

SEA-LETTER.

Vid. *Documents*.

SEARCH.

Vid. *Warranty*. (*Neutral*).

SEA-RISK.

Vid. *Perils of the sea*.

SEA-WORTHINESS.

Vid. *Ship*.

SENTENCE.

As to the effect of a foreign sentence in our courts. Vid. *Warranty*, (*Neutral*). *Ship*, (*Conduct of*).

SHIP.

Who shall be deemed owners of a ship. 93
Vid. *Register*.
Of the sea-worthiness of ship. 363
Implied warranty of. 364
No previous survey necessary. ib.
Whether a ship shall be presumed to have been sea-worthy, till the contrary be shewn. 365

When the proof of unsea-worthiness lies on the insurer. 368

Nothing will excuse the breach of this implied warranty. ib.

Not the ignorance of the insured. 369

Nor the insurer's knowledge of the state of the ship. ib.

In what case the insurer shall be liable for damage occasioned by the insufficiency of the ship. 372

In what case the owners. 156, 372

It is sufficient if the ship be sea-worthy at her departure. 373

If a defect appear soon after sailing. ib.

No representation as to the state of the ship is necessary. ib.

The ship must be properly manned to make her sea-worthy. ib.

Changing the ship. 374

When the ship may be changed. ib.

If by necessity, the risk will continue even on new goods bought with the proceeds of those saved. 377

When the best is done for the interest of all parties, the insurers are liable. 378

When the captain ought to hire another ship. ib.

To what expenses the insurers shall be liable in such case. 379

Insurance of goods on board "ship or ships". ib.

When this may be. ib.

If there be two policies on goods in *ship or ships*, and one of the ships be lost, whether the insurers on both shall contribute. 380

If there be two policies on goods, the one in a *certain ship*, the other on *ship or ships*, and the latter be lost, whether the latter policy shall answer. 381

If goods of larger value than the sum insured on *ship or ships*, be put on board several ships, and some are lost, how the loss shall be borne. 383

If goods insured in several ships, by several policies, be all sent in one vessel to the several ships, and this vessel be lost, how the loss shall be borne. 384

Conduct of the ship.

This must be according to law. 385

In what case a legal disqualification in the captain will avoid the policy. ib.

Whether the contract will be avoided by a ship's acting in contravention of a treaty. 387

Or in contravention of the navigation laws. 389

Whether the ship must conform to the laws of the countries from, and to which, she sails. 390

As to the offence of destroying any ship.

Vid. Barratry (how punished). Loss (fraudulent).

As to the risk upon the ship. *Vid. Risk.*

As to foreign-built ships. *Vid. Warranty (Convey).*

SHIPPING AND LANDING GOODS.

Who shall make good a loss happening in shipping or landing goods. 159

Of the risk of landing goods in private lighters. 165

In public lighters. 167

SHIP'S HUSBAND.

Vid. Agent.

SHIP OR SHIPS.

Vid. Ship.

SHIPWRECK.

Vid. Abandonment, Perils of the Sea.

SIEGE.

Vid. Blockade.

SLAVES.

Formerly insured as goods.

77
Even

Even from loss by mortality. 77
 Law of *France* as to the insurance of slaves. 132
 Formerly in *England* they were insured against all risks. 133
 How the insurance of them is now regulated. 134
 When a slave shall be said to have died a natural death. 134
 When he shall be deemed to have been killed in a mutiny. 617
 If the captain of a slave ship have not the qualification required by law, the insurance will be void. 385
 Whether slaves thrown overboard in a scarcity of water, be a loss by perils of the sea. 418

SMUGGLING.

An insurance upon smuggled goods is void. 48
 And the insurer may take this objection, though he knew the trade to be illegal. 49
 Opinions of foreign writers on this point. ib.
 What is meant by smuggled goods. ib.
 How insuring the delivery of smuggled goods is restrained. ib.
 How insuring the delivery of wool in foreign parts is restrained. 51
 Whether a trade prohibited by the laws of one country, may be legally insured in another. ib.
 The law of *England* pays no regard to the revenue laws of other countries. 53
 Whether a policy on a smuggling trade in a foreign country, contrary to a *British* treaty, be a legal contract. ib.
 There can be no legal insurance on a trade carried on contrary to the laws of the dependencies of this kingdom. 55
 Whether money, jewels, &c. intended to be clandestinely transported, may be insured. 226
 If the master be guilty of smuggling, this is barratry. 174
 But if the ship be not seized, for such smuggling, till after the end of the risk, the insurers will not be liable. ib.

STAMP.

Vid. *Policy (Stamp). Fire (Insurance against).*

STATUTES CITED.

An. Reg. Edward I.

3 c. 4, p. 470 n
 4 c. 2, p. 470 n

Edward III.

11 c. 2, p. 12
 25 c. 2, p. 475
 27 c. 13, p. 470 n

Richard III.

1 c. 9, p. 13

Henry VIII.

28 c. 15, p. 476, 478

Elizabeth.

43 c. 12, p. 3, 11, 24

James I.

21 c. 3, p. 13

Charles I.

12 c. 18, p. 127
 13 & 14 c. 23, p. 26
 16 c. 6, p. 640
 22 & 23 c. 11, p. 640

William & Mary.

4 & 5 c. 15, p. 50, 51

William III.

8 & 9 c. 36, p. 51
 9 & 10 c. 44, p. 55, 58
 — c. 52, p. 123
 11 & 12 c. 7, p. 476, 477

Anne.

1 st. 2. c. 9, p. 477
 9 c. 6, p. 2

An. Reg.

- 12 c. 16, p. 560
 — c. 18, p. 470

George I.

- 1 c. 5, p. 691
 4 c. 11, p. 476
 — c. 12, p. 477
 6 c. 18, p. 27, 40, 46, 596
 7 c. 27, p. 42 n. 73
 8 c. 24, p. 476
 11 c. 29, p. 477
 — c. 30, p. 601

George II.

- 7 c. 15, p. 159, 160
 11 c. 21, p. 642, 644
 13 c. 4, p. 426, 473, 485
 19 c. 37, p. 103, 113, 599.
 642
 22 c. 33, p. 263
 26 c. 19, p. 471
 29 c. 34, p. 429, 473, 488,
 492

George III.

- 14 c. 48, p. 96 n. 213, 672
 16 c. 5, p. 68
 19 c. 67, p. 84 n
 22 c. 25, p. 432, 515
 — c. 35, p. 489 n
 24 c. 47, p. 176
 25 c. 44, p. 213, 216
 26 c. 60, p. 92, 285
 — c. 86, p. 160
 27 c. 1, p. 2
 — c. 19, p. 285
 28 c. 38, p. 51, 213 n
 — c. 56, p. 214, 216, 220
 30 c. 33, p. 134 n. 135
 31 c. 54, p. 385 n
 33 c. 27, p. 31, 36
 — c. 52, p. 55, 57, 58, 123
 — c. 66, p. 196, 433, 473
 34 c. 68, p. 285
 — c. 80, p. 135
 35 c. 66, p. 515
 — c. 63, p. 140, 228, 242
 — c. 8, p. 591
 — c. 80, p. 85

An. Reg.

- 37 c. 97, p. 60, 124
 38 c. 76, 280, 284
 39 c. 80, p. 134 n
 41 c. 10, p. 242 n, 245

STOWAGE.

Vid. Risk.

STRANDING.

Vid. Perils of the Sea.

TACKLE.

When the risk continues on the tackle
 and furniture of the ship, even on
 shore. 180, 186

TENDER.

Vid. Proceedings (plea).

THEFT.

When the owners and master shall be
 liable for theft.

Vid. Risk (owners liable).

TIME (Insurance for).

Not to be made for longer than twelve
 months. 243

When the risk ends on an insurance,
 for time. 173, 503

TOTAL LOSS.

Vid. Loss, Abandonment.

TREATY.

Whether a trade, carried on in contra-
 vention of a treaty, may be insured.

53, 389

TRUSTEE.

When he may insure; *Vid. Interest.*

VISITATION AND SEARCH.

The right of, vindicated. 65, 306
Vid. Neutral.

UNDERWRITERS.

Character of the *French* underwriters.

39

Character of the *English*.

40

An agent or broker ought not to be an underwriter.

209, 607

USAGE OF TRADE.

What shall be deemed an usage of trade.

19, 393

Whether the usage of one trade may be given in evidence to prove the practice of another similar trade.

172

Whether a practice prevailing for *three years*, amounts to an usage of trade.

ib.

Upon what principle the authority of usage rests.

609

How far it ought to prevail.

ib.

An usage inconsistent with the terms of the policy, cannot be received in evidence.

267

In what degree the policy is controlled by usage.

571, 626

"USURPED POWER."

How these words are understood in a policy against fire.

687

VALUATION.

How this is made in a valued policy.

533

VALUED POLICY.

Vid. Policy.

VENUE.

When it may be changed in an action on a policy.

597

VOYAGE.

No legal insurance can be made on an illegal voyage.

122

As if it be contrary to the laws of this kingdom or any of its dependencies.

ib.

Or the law of nations.

ib.

What shall be a legal voyage between *America* and the *British* settlements in *India*.

124

How the illegality of the voyage affects the legality of an insurance on it.

129

How the voyage shall be described in the policy.

227

The description of the voyage is a reference to all the circumstances attending it.

182

What shall be the consequence of sailing on a voyage different from that described in the policy.

230

What shall be a different voyage, and what an intended deviation.

231,

232, 406

*Vid. Deviation.*What is meant by *the course of the voyage*.

392

WAGER.

The mischiefs arising from a spirit of gaming.

95

Legality of wagers considered.

ib.

Difference between a wager and an insurance.

97

Form of a wager policy.

ib.

The words *interest* or *no interest*, do not necessarily make a wager.

238

Prohibited in most countries.

98

Whether a legal contract at common law.

ib.

At what time it came into use in *England*.

99

The series of authorities on which the legality of it rests.

99 to 102

How restrained by statute.

103

Exceptions

- Exceptions as to insurances, *interest or no interest*. 103
 But the restrictions do not extend to foreign ships or goods. 105
 An insurance on one thing, to depend on the fate of another is a wager. 106
 What the insured in a wager policy takes upon himself. 108
 A small interest will not take the case out of the statute. 109
 What agreement shall be deemed a wager policy. *ib.*
 A valued policy is sometimes only a cover for a wager. 110
 But if it be meant as an *indemnity*, it will not be void. *ib.*
 Yet recovering beyond the interest is against the statute. 111
 A valued policy on *expected profits* has been held not to be a wager. *ib.*
 So, upon *expected commission* as consignee. 112
 Whether there may be a wager in the form of a bottomry loan. *Vid. Bottomry.*

WAGES.

- When wages incurred during a repair shall be a general average. 464, 620
 Whether seamen's wages may be insured. 74
 Whether money may be lent on respondentia on wages. 645
 How the payment of seamen's wages is regulated. 73
Vid. Sailors.

WARLIKE STORES.

Vid. Contraband of war.

WARRANTY.

- Nature of.* 248
 Different sorts. *ib.*
 How construed. 249

- How performed. *ib.*
 Effect of the breach of it. 250

How made. 251

- When a separate paper will be considered as part of the contract. 252

Warranty to sail by a given day. 253

- The not sailing by the day will not be excused by an embargo. *ib.*

Or an irresistible force. 254

- Warranty to sail *after* the day must be equally observed. *ib.*

What shall be a compliance with this warranty. 255

- If the ship sail before the day, but not in the direct course of the voyage, this will not be a compliance, but a different voyage, unless it be to join convoy. 256

If a ship break ground with intent to sail, but is immediately obliged to put back, this will be a compliance. 261

To sail with convoy. *ib.*

- Effect of a non-compliance with this warranty. *ib.*

When the ship is disabled in her passage to the place of rendezvous. 262

1. *It must be with the regular convoy.* *ib.*

A convoy, what. *ib.*

How the officers, &c. of the men of war are punishable for misbehaviour. 263

What sort of convoy is meant by the warranty. *ib.*

The mere protection of a man of war is not convoy. 264

2. *It must be from the place of rendezvous appointed by government.* *ib.*

When the ship is protected by the policy to the place of rendezvous. *ib.*

3. *It must be a convoy for the voyage.* 266

What is meant by convoy for the voyage. 266, 267

Whether

- Whether different convoys for different parts of the voyage be convoy for the voyage. 269, 271
4. *The ship must have sailing instructions* 271
- How far sailing instructions are essential to sailing with convoy. ib.
- Where the convoy fails before the time appointed. 272
- In what case the want of sailing instructions will be excused. 274
- If the captain lose any opportunity of obtaining them before he fails it will be fatal. 276
- This warranty must be expounded according to the usage of trade. 278
5. *The ship must depart and continue with the convoy, till the end of the voyage, unless separated by necessity.* ib.
- If the ship do not get under weigh with the convoy, it will be fatal. 279
- So, if she leave the convoy without necessity. ib.
- If separated, she must do all she can to rejoin the convoy. 279, 280
- If the master, through fraud or negligence, leave the convoy, it will discharge the insurers. 280
- How sailing with convoy is regulated by statute.* 280
- By 38 G. III, c. 76, no ship shall sail without convoy. ib.
- Penalties for sailing without, or deserting the convoy. 281
- In such case the insurance shall be void. ib.
- Bond to be given that the ship shall sail with, and not desert, convoy. 282
- Exceptions. ib.
- Duty of the captain with respect to signals. 283
- When a ship shall be within the exception. ib.
- That the thing insured is neutral property.* 286
- Nature of this warranty. 286
- How expressed in the policy. ib.
- What shall be deemed neutral property. ib.
- It is sufficient if the warranty be true when made. 287
- The chance of future war is a risk within the policy. ib.
- When this warranty shall be falsified by a condemnation as prize.* 288
- When the judgment of a foreign court shall be conclusive in *English* courts. 288, to 292, 328
- The courts of justice in *France* pay no regard to the judgments of foreign tribunals. 288
- When the court may examine the question of neutrality, notwithstanding the judgment. 292, to 294
- Whether an unjust sentence be conclusive. 297
- To what extent the foreign judgment is conclusive. 300
- What shall amount to a forfeiture of neutrality.* 301
1. *Refusing visitation and search.* ib.
- Whether a neutral be bound to submit to visitation and search. ib.
- This question considered. 306
- Law of nations defined. ib.
- Doctrine of *Habner*. ib.
- Of the *Consolato del mare*. 307
- Of *Bynkershoek*. ib.
- Of *Vattel*. 308
- French* ordinances. ib.
- Attempts of the Northern confederacy. 309
- Judgments of the *English* court of admiralty. 311
- The penalty of resistance. 314
- 2 *Forfeiture of neutrality by sailing without proper documents, or violating treaties.* 317
- As to the documents requisite for neutrals. *Vid Documents.* What

What shall be the effect of the want of documents. 319

It is not enough that a ship be in fact neutral. ib.

She must be so to the purpose of being protected. 317, 319

If she be not properly qualified to sail as a neutral any part of the voyage, the insurers will be discharged. 320

If a ship subject herself to be carried into an enemy's port, she falsifies the warranty. 321

Neutrals are not bound to take notice of regulations made by belligerents, contrary to the law of nations. 322

Whether, being informed of them, they ought to take notice of them for their own safety. 324

If an insurer know of them, he should give notice to the insured. 326

If both be ignorant, the non-observance of them will not be a forfeiture. ib.

The ship should be navigated according to treaties. 323, 330

WET.

When the owners and master shall be liable for loss occasioned by wet. 157

WISBUY, (*laws of*).

Vid. *Marine law*.

WITNESS.

Vid. *Evidence*.

WOOL.

Vid. *Smuggling*.

WORMS.

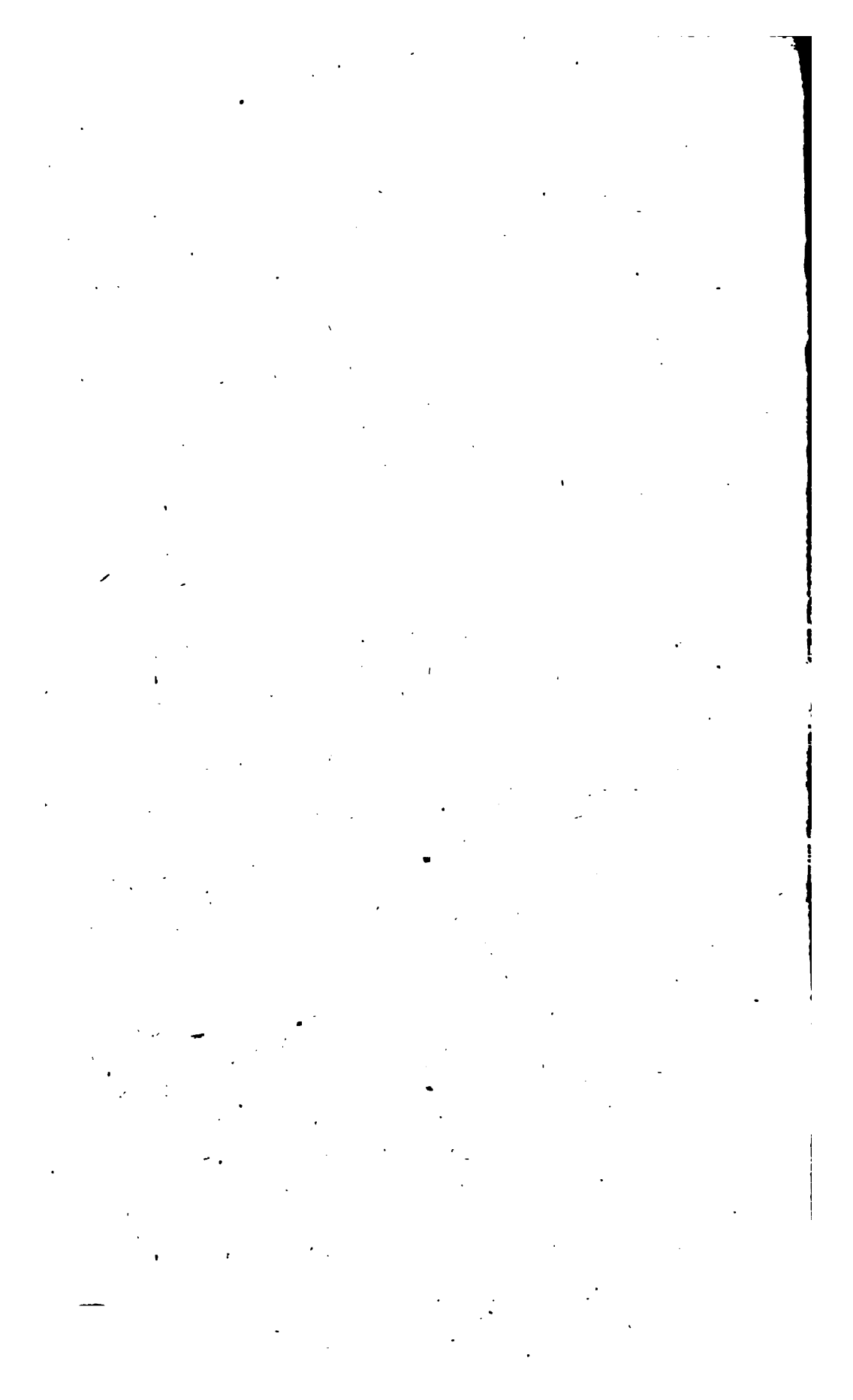
If a ship be destroyed by worms, it is not a loss by the perils of the sea. 419

WRIT OF ERROR.

Suing out a writ of error is a breach of the consolidation rule, though for manifest error. 605

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